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Supreme Court of the United States

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS, APPELLANT,

vs.

THE STATE OF NEW HAMPSHIRE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

FILED SEPTEMBER 17, 1952

Jurisdiction postponed November 10, 1952

SUPREME COURT OF THE UNITED STATES

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INDEX

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[fol. 1]

IN SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

ROCKINGHAM

No. 4042

STATE

v.

ROBERT W. DERRICKSON

STATE

v.

WILLIAM POULOS

OPINION—June 5, 1951

Complaints, for conducting open air public meetings in Goodwin Park, which abuts Islington Street in the city of Portsmouth, on the afternoons of Sunday, June 25, 1950, and July 2, 1950, without a permit therefor contrary to the requirements of chapter 24, article 7 of the municipal ordinance of the city of Portsmouth. The ordinance is as follows:

"Section 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the City Council.

"Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open air public meeting.

"Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such license shall perform or exhibit or such parade, procession, or open air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.

"Section 25. Penalty. Any person who violates section 22 of this Article shall be fined Twenty Dollars."

Upon appeal *de novo* to the Superior Court from the municipal court of Portsmouth, the defendants before trial moved to dismiss the complaints on the ground that the ordinance as applied was unconstitutional and void. Pursuant to an agreed stipulation of the facts by the parties the question so raised was transferred without ruling by *Goodnow*, C. J.

The congregation of Jehovah's witnesses "acting through the defendants, Derrickson and Poulos, made application to the city council of the City of Portsmouth for a license to hold a public meeting in Goodwin Park. A written petition was duly addressed to the city council of Portsmouth and filed with the clerk. They were informed that they could appear and speak in behalf of the petition before the city council. The petition was placed on the agenda for hearing May 4, 1950. On that date the defendants appeared before the city council, the defendant Derrickson doing the speaking in behalf of the congregation of Jehovah's witnesses. The congregation offered to pay any reasonable fee customarily paid for the use of the park as well as any expenses incurred by the city in permitting the holding of the requested meeting. The defendants gave the names of the Bible talks to be delivered and the date, time and place of the proposed assemblies in the park in question."

After a full hearing before the city Council "the petition of the defendants was denied because the members of the council stated that they had never received a petition of a religious group to use the public parks and they were fearful of creating a disturbance if the application was granted and the assembly held." Thereafter the defendants on Sunday afternoon, June 25, and July 2, 1950, held their meetings without a license. The defendant Derrick- [fol. 2] son was not allowed to continue after speaking for forty-five minutes and the defendant Poulos was not allowed to continue after speaking about fifteen minutes. No disturbance resulted from the meetings.

Gordon M. Tiffany, Attorney General, Glenn Davis, Law Assistant, and Arthur J. Reinhart, City Solicitor (Mr. Tiffany and Mr. Reinhart orally), for the State.

Hayden C. Covington (of New York) and Henry M. Fuller (Mr. Covington orally), for the defendants.

KENISON, J.:

The Bill of Rights of the Constitution of New Hampshire does not guarantee to every individual or to every group of individuals absolute liberty. "When men enter into a state of society, they surrender up some of their natural rights to that society in order to ensure the protection of others; and, without such an equivalent, the surrender is void." N. H. Const., Part First *Art.* 3rd. The rights of freedom of assembly, speech and worship are accorded a high place in and are specifically guaranteed by the New Hampshire Constitution and statutes implementing it. While these freedoms cannot be prohibited, they may be subjected to reasonable and nondiscriminatory regulation in order that the constitutional rights of others may be equally protected in the interest of public order and convenience.

The ordinance drawn in question in this case is copied from the statute which was construed as valid in *State* v. *Cox*, 91 N. H. 137 and affirmed by a unanimous court in *Cox* v. *New Hampshire*, 312 U. S. 569. The construction placed on the statute in that case (R.L., *c.* 174, *ss.* 2, 4) is the construction that must be given to sections 22 and 24 of the ordinance. "The discretion thus vested in the authority [city council] is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has and the legislature attempted to delegate no power it did not possess." *State* v. *Cox*, *supra*, 143.

The defendants dismiss the applicability of this case briefly in the following manner: "The *Cox* case is distinguishable here because in this case the respondents have attempted to comply with the ordinance and offered to pay the necessary fee and expenses." It is doubtful that

it makes any critical constitutional difference as to the validity of an ordinance or statute that there was no compliance in one case or attempted compliance in the other. However, we do not pause to examine this contention with any more detail than was advanced in its behalf since the defendants have chosen to place their chief reliance on the recent case of *Niemotko* v. *Maryland*, 340 U. S. 268, which will be hereinafter discussed.

We do not know the number of parks, public commons, public squares and other public grounds in the city of Portsmouth, although it is a matter of public knowledge that Goodwin Park is not the only one in the city (*Sherburne* v. *Portsmouth*, 72 N. H. 539) and that it is a small park. There is nothing to indicate that it has been used for [fol. 3] religious meetings or sectarian purposes since it was donated to and dedicated by the city more than a half century ago. See Portsmouth City Reports 1887, page 12; Annual Report City of Portsmouth 1888, page 13; Gurney, Portsmouth Historic and Picturesque 1902, page 64. It cannot be argued that this is a recent discrimination against Jehovah's witnesses since the denial of the park for religious and sectarian meetings is consistent with a definite and systematic policy which treats the Jew, the Catholic, the Protestant and the Jehovah's witness alike.

If the city of Portsmouth wishes to use one of its small parks for other public purposes and to prohibit its use for religious and sectarian meetings in a nondiscriminatory way, constitutional rights are not abridged if there are still adequate places of assembly for those who wish to hold public open air church meetings. If the right to hold a church meeting on public property is to be given a preferred position, it does not necessarily follow that that right can be exercised in every park at any time that a certain group desires to do so. The privilege of people to seek peace and sanctuary in a public park, the privilege to be let alone and the privilege not to be subject to oral aggression of a religious nature on Sunday are entitled to some consideration. If they are allowed to abridge or unreasonably impair the freedoms of free speech, assembly and worship they are unconstitutional. If such privileges are provided for in a systematic and nondiscriminatory way so that the freedoms of speech, assembly and worship

can be adequately exercised within a city the Constitution is no bar to their enforcement.

In the present case we have an ordinance which the defendants have conceded to be valid on its face. The ordinance has been construed by this court and the Supreme Court of the United States in such a way that no discriminatory or unfair abridgement is reasonably possible. This is not a case like *Niemotko* where there was an amorphous, indefinite and nonstatutory policy. In *Niemotko* the applicants were questioned by the city council in a way which clearly indicated prejudice, bias and the consideration of immaterial matters. Those factors are not present in this case. In *Niemotko* the city had previously permitted gatherings by religious groups which is not the case here. In *Niemotko* it was evident there was a previous restraint under an indefinite licensing system which in effect regulated the use of public parks according to the nature of the applicant and the content of his speech. No such attempt is present in this case.

The persistent and perplexing problem of making a reasonable and nondiscriminatory accommodation when fundamental rights collide cannot be solved in a vacuum. The factual situation is therefore extremely important in every case.

The record before us presents an ordinance valid on its face and without any evidence of discrimination in the manner in which it is construed and applied. The defendants have assumed in their argument that the question before this court is whether religious meetings can be prohibited in public parks. The issue which this case presents is whether the city of Portsmouth can prohibit religious and church meetings in Goodwin Park on Sundays under a licensing system which treats all religious groups in the same manner. Whether a city could prohibit religious meetings in all of its parks is a doubtful question which we need not decide in this case. What we do decide is that a city may take one of its small parks and devote it to public and nonreligious purposes under a system which is administered fairly and without bias or discrimination.

[Vol. 4] No question is presented in this case as to the validity of the fee charged for the use of the park in cer-

tain cases. The fee, which is usually nominal and frequently nonexistent, in no event can exceed the reasonable costs of policing the requested meeting.

The fact that some members of the city council thought the granting of a license for a church meeting in Goodwin Park would create a disturbance does not change the result. Although it was an erroneous and insufficient reason for denying the license (*Kunz* v. *New York*, 340 U. S. 290), it has long been the rule in this State that a wrong reason for a correct decision does not invalidate the decision. The main reason for denying the license was the municipal policy of restricting Goodwin Park to nonreligious public purposes and under the factual circumstances of this case was a proper one. See *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 341.

Reliance is also placed on *County of Milwaukee* v. *Carter*, (Wis.) 45 N. W. (2d) 90, where an ordinance prohibiting religious services in public parks was held unconstitutional. That case is not in point since it purported "not to regulate but to prohibit speech in public parks on political as well as religious subjects." At this juncture it is important to state that in sustaining the Portsmouth ordinance no reliance is placed on *Davis* v. *Massachusetts* 167 U. S. 43, which is believed to have been so eroded by the force of time and recent decisions as to be valueless as a binding precedent.

Finally mention should be made of the judicial climate in which the Portsmouth ordinance is to be construed and applied. In their consistent effort to vindicate their civil rights, Jehovah's witnesses have been accorded protection here at times when and under circumstances in which these rights were not protected elsewhere. *State* v. *Lefebvre*, 91 N. H. 382; *Prince* v. *Massachusetts*, 321 U. S. 153; *State* v. *Richardson*, 92 N. H. 178. While they have not been allowed to push free speech to the point of abuse (*State* v. *Chaplinsky*, 91 N. H. 310; *Chaplinsky* v. *State of New Hampshire*, 315 U. S. 568), limitless discretion, arbitrary action and discriminatory practice on the part of municipal officers have never been allowed against Jehovah's witnesses. There is nothing in the record in this case to raise an inference that Portsmouth is guilty of palpable evasion of the

defendants' rights under any guise whatever. On the contrary the city has enforced with respect to one small park an honest, reasonable and nondiscriminatory licensing system which operates fairly on all.

Case discharged.

All concurred.

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. OCTOBER TERM, 1951

Superior Court

No. 3411

STATE

vs.

ROBERT W. DERRICKSON

No. 3412

STATE

vs.

WILLIAM POULOS

RESPONDENTS' BILL OF EXCEPTIONS

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. OCTOBER TERM, 1951

Superior Court

No. 3411

STATE VS. ROBERT W. DERRICKSON

No. 3412

STATE VS. WILLIAM POULOS

RESPONDENTS' BILL OF EXCEPTIONS

The respondents present unto the Court the following Bill of Exceptions.

STATEMENT OF CASE

This is a prosecution for alleged violation of Article 7, Chapter 24, of the Ordinances of the City of Portsmouth, New Hampshire, reading, among other things, as follows:

"Section 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open air public meeting upon any ground abutting thereon shall

be permitted unless a license therefor shall first be obtained from the City Council.

"Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open air public meeting.

"Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such licensee shall perform or exhibit or such parade, procession, or open air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.

"Section 25. Penalty. Any person who violates section 22 of this Article shall be fined Twenty Dollars."

COMPLAINT

Respondents were each proceeded against in the Municipal Court of Portsmouth by separate complaints for two alleged violations, one occurring on June 25, 1950, and the other occurring on July 2, 1950, under the above ordinance. The complaint in each case, among other things, reads as follows:

> "Did on a certain ground abutting a public street, to wit, Islington Street and upon certain ground abutting thereto known as Goodwin Park, hold conduct an open air public meeting without having first obtained a license from the City Council so to do".

The respondents pleaded not guilty in the Municipal Court. Each was found guilty, fined and appealed to the Superior Court of Rockingham County. On the first hearing before the Superior Court the case was reserved and at an earlier term transferred to the Supreme Court. The parties stipulated as to the facts. The Supreme Court held that the ordinance was constitutional because the park was limited in its dedication and permissive use by the City of Portsmouth.

The case was tried in the Superior Court following the opinion

of the Supreme Court on pleas of not guilty entered by the respondents. An order was made consolidating both cases for trial. The Court heard and considered both cases as one case under the order of consolidation. The respondents waived the right of trial by jury and submitted the determination of all issues of fact and law to the Court without a jury.

Upon the trial the evidence of the prosecution and the respondents was reported by the official court reporter and the memorandum of the evidence transcribed by the stenographer is incorporated herein and made a part hereof as though copied at length herein, the evidence to be printed along with this bill of exceptions for use in the Supreme Court of New Hampshire.

At the close of all of the evidence and before argument of counsel and the pronouncement of the judgment of the Court, the respondents made a joint motion for a finding of not guilty, a judgment of acquittal and for dismissal of the prosecution on the grounds specifically set forth in the record of this Court, which motion was denied by this Court. The respondents seasonably objected and took exception to the denial of the respondents' motion for judgment of acquittal and a finding of not guilty, which motion reads as follows:

"Now come the above respondents and move the Court to find the defendants not guilty, enter a judgment of acquittal and dismiss the prosecution for the following reasons:

"1. The undisputed evidence shows that the members of the city council and the city council itself acted arbitrarily, capriciously and without support of law and of fact when they denied the application made by Jehovah's witnesses in behalf of the defendants to deliver the public talks upon the occasions in question.

"2. The undisputed evidence shows that the park in question is a public park, dedicated as such without any limitations in the deed of dedication or in the ordinances of the City of Portsmouth and the defendants had the legal right to deliver the talks in the park and it was the duty of the city council to issue to the defendants permits to use

the public park in question for public meetings and publ talks.

"3. If the ordinance is construed and applied so as t justify convictions of the defendants under the facts in th case, then the ordinance is unconstitutional as construed an applied because it abridges the rights of the defendants t freedom of assembly, freedom of speech and freedom of wor ship, contrary to the Bill of Rights of the New Hampshir Constitution and the First and Fourteenth Amendments to th Constitution of the United States."

Thereupon the Court took the case under advisement and on th 6th day of December, 1951 rendered and entered a finding of guilt or a verdict of guilty and filed a memorandum opinion reading a follows:

"These cases are appeals from the Portsmouth Munici pal Court. The complaints charge the respondents with th violation of Chapter 24, Article 7, section 22, of the Munici pal Ordinances of the City of Portsmouth. Section 22 reads as follows:

"Sec. 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the city council":

"The respondents admit violations of the ordinance but take the position that the refusal of the Portsmouth City Council to issue licenses to them to speak on religious topics in Goodwin Park, a public park in Portsmouth, was arbi- trary and unreasonable and that their constitutional rights of freedom of assembly, freedom of speech and freedom of worship have been violated contrary to the Bill of Rights of the New Hampshire Constitution and the First and Four- teenth Amendments to the Constitution of the United States.

"The constitutionality of the statute, Revised Laws, Chapter 174, sections 2 and 4, by virtue of which the city ordinance was enacted, was settled in the Supreme Court of the United States in Cox vs New Hampshire, 312 U. S. 569, and cannot now be questioned in these proceedings.

"Counsel have tried these cases on the theory that the refusal of the City Council to grant licenses to the respondents was in issue. It is found as a fact that the action of the City Council in refusing to grant licenses to the respondents was arbitrary and unreasonable, but the Court rules as a matter of law that this issue is not properly before it in these proceedings.

"The respondents could have raised the question of their right to licenses to speak in Goodwin Park by proper civil proceedings in this Court, but they chose to deliberately violate the ordinance.

"Verdict of guilty against both respondents."

Thereafter the Court duly pronounced sentence upon the respondents and fixed the punishment of each as follows: Twenty Dollars ($20.00).

The respondents have duly excepted to the finding of guilty and the pronouncement of a judgment convicting the respondents and have duly taken steps to appeal the judgment of conviction to the Supreme Court of New Hampshire in the time and in the manner required by law.

This Bill of Exceptions, the complaint against each of the respondents, the evidence as transcribed by the official court reporter, the rulings of the Court on the admission and exclusion of evidence, motions and colloquies of Court and counsel, are made a part of this Bill of Exceptions and are to be printed as an appendix to this Bill of Exceptions. The exhibits may be referred to in the brief and upon oral argument in the Supreme Court but need not be printed. The exhibits are ordered sent up to the Supreme Court in their original form.

And now that justice may be done the respondents request that

this, their Bill of Exceptions, be allowed and the same transferred to the Supreme Court for judicial determination of the questions of law raised herein.

ROBERT W. DERRICKSON
WILLIAM POULOS
By
HAYDEN C. COVINGTON
HENRY M. FULLER
Attorneys for Respondents

ORDER ALLOWING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions is hereby allowed, and all questions of law thereby raised, as well as any other questions raised by exceptions taken during the trial as shown by the record, are reserved and transferred. A transcript of the testimony and proceedings had during the trial, together with one copy of each complaint against both of the respondents, to be printed as an appendix to the Bill of Exceptions. All exhibits offered during the trial may be used in their original form in the Supreme Court. Such exhibits are hereby ordered sent to the Supreme Court of New Hampshire along with the record in this case but need not be printed unless that court so directs.

HAROLD E. WESCOTT
Presiding Justice

COMPLAINT AGAINST ROBERT W. DERRICKSON

that Robert W. Derrickson of said Portsmouth, on the twenty fifth day of June in the year of our Lord one thousand nine hundred and fifty at Portsmouth, with force and arms, did on a certain ground abutting a public street, to wit, Islington St. and upon certain ground abutting thereto known as Goodwin Park, did conduct an open air public meeting without having first obtained a license from the city

council so to do contrary to the form of the city ordinance in such case made and provided, and against the peace and dignity of the state.

COMPLAINT AGAINST WILLIAM POULOS

that William Poulos of Manchester, N. H. on the second day of July in the year of our Lord one thousand nine hundred and fifty at Portsmouth, with force and arms, did on a certain ground abutting a public street, to wit, Islington Street, and upon certain ground abutting thereto, known as Goodwin Park, did conduct an open air meeting without having first obtained a license from the city council so to do contrary to the form of the city ordinance in such case made and provided, and against the peace and dignity of the state.

Trial before Honorable Harold E. Wescott, Presiding Justice
At Exeter, New Hampshire, December 3, 1951

Mr. Reinhart: We wish to read the complaint, your Honor please.

Court: They have signed waivers of jury trial.

Clerk: This is arraignment of Robert W. Derrickson.

Mr. Covington: May is please the Court, Mr. Derrickson is not now in the courtroom. He has been in the hospital and he is of course extensively disabled, but we will waive the reading of the complaint and arraignment and consent to trial without jury. I will have a written jury waiver and will have him sign, and this other defendant—

Court: He's already signed the waiver.

Mr. Covington: Mr Poulos signed it. Did Mr. Derrickson? We are ready also in the Poulos case, may it please the Court and the same situation exists there.

Court: You plead not guilty?
Mr. Covington: Not guilty and then—
Court: All right.

AMERICO J. BELLUCCI Sworn Mr. Bellucci, called by State being duly sworn, testified as follows:

Q. (*By Mr. Reinhart*): State your name and residence. A. My name is Americo J. Bellucci, residence Portsmouth, New Hampshire. Q. What is your official position? A. City Clerk of the City of Portsmouth. Q. As City Clerk do you have custody of the records regarding the issuance of permits? A. I do. Q. Have you examined your records to ascertain whether or not a permit had ever been issued to Robert W. Derrickson? A. Yes sir. Q. You have so examined? A. Yes. Q. And whether or not a permit had ever been issued to the said Robert W. Derrickson to conduct an open air, to speak in a public park? A. No. Q. At Goodwin Park in Portsmouth? A. No permit. Q. No permit has ever been issued. Now at my request have you also examined your records to ascertain whether a permit had ever been granted to William Poulos? A. Yes. Q. And what was the result of your investigation? A. No permit could be found. *Mr. Reinhart:* No permit has ever been issued.

Cross Examination Q. (*By Mr. Covington*): Now sir are you familiar with the ordinances in the City of Portsmouth? A. I am somewhat familiar, yes. Q. Do you have the city ordinances in your custody, copies of them? A. Yes I do. *Mr. Covington:* Do you have those please? *Mr. Reinhart:* Yes. Q. (*By Mr. Covington*): I show you a book of the ordinances of the City of Portsmouth and ask you to identify what I present to you? First, tell the Court what that is please. A. Well it's the ordinance pertaining to issuance of licenses for, as it says, theatricals, parades or open air meetings. Q. Would you mind reading that ordinance to the Judge? The entire thing. A. Article 7 entitled Theatricals, parades, open air meetings. Section 22. License required. No theatrical or dramatic presentation, representation shall be performed or exhibited and no parade or procession upon any public street or way and no open air public

meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the City Council. Section 23. License form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit or of such parade, procession or open air public meeting. Section 24. Fee. The fee for such a license shall be not more than Three Hundred Dollars for each day such licensee shall perform or exhibit or such parade, procession or open air public meeting shall take place but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars. Section 25. Penalty. Any person who violates section 22 of this article shall be fined Twenty Dollars. Q. Is that all? A. That is all. Q. Now in that book of ordinances do you have any other ordinances, rules or regulations in respect to the use of the parks of the City of Portsmouth? A. Well offhand I could not say without making a study. Q. Well can you tell us whether that is the only ordinance there is in reference to the use of the public parks for public meetings? A. Well I would say that I used that ordinance in issuing permits in such— Q. Is there any other ordinance in the books that pertains to the issuance of permits for the use of parks for any sort of public meetings? A. I'd say offhand I don't know. Q. Would you mind looking through that then since you say you don't know and tell us if in that book of ordinances you find any other ordinances or rules or regulations in respect to the use of any one park or the use of all the parks of Portsmouth? Will you please go through it carefully because counsel is not in a position to stipulate that that is the only ordinance because he doesn't know whether it is or is not the only ordinance. A. The question again please. (Question read by stenographer) A. I can find none here that pertain to the parks or any one park. Q. In other words, we can take it that there is no other ordinance or no other set of rules and regulations in respect to the use of any one or all of the parks by permit from the City Clerk except that which you have read into the record. Is that correct? A. I would say so. Q. All right sir. Are you familiar with the maps or map of the City of Portsmouth showing the location of the various parks? A. I am somewhat. Q. I show you an official map showing the streets of Portsmouth and the blocks

or squares of the City surrounded by the streets and I ask you t tell the Court if you can locate or verify the location of the variou parks that are identified on the map. I point your attention to th arrow having written in it the Plains Park and ask you to stat whether that is— A. The Plains Park is at the intersection of Is lington Street and Middle Road where it joins to meet Greenlan Road. Q. Middle Road and Plains Avenue? A. No, Islingto Street and Middle Road. Q. And it's also surrounded by Plain Avenue, intersects— A. Islington Street. Q. Middle Road? A And Middle Road. Q. All right. And the spot that is identifie as Plains Park by areas is correct, is that right? A. Yes. Q. Now then, I show you the next park that I point to being Langdon Park and ask you to describe to the Judge the location of that park as best you can. I'll ask you whether or not the location shown on the map is correct and accurate? A. Langdon Park seems to be in the place where I would think it would be. Q. Now then, give us the street. A. Well it's off Junkins Avenue. Q. Junkins Avenue. A. And— Q. It's near South Street, isn't it? A. Yes. Q. South Street runs along here, it's between South Street and Rockland Street, is it on Junkins? A. Yes. Q. South Park, where is that? A. South Park. Q. Just below north. A. It is north of Junkins Avenue off Rockland Street. Q. Rockland Street, isn't it, that is where South Park is located? A. Yes. Q. Where is Haven Park situated? A. Haven Park is between Howard Street and Livermore Street. Q. And where is Pierce Island Park located? A. Pierce Island Park is on the island, on Pierce Island just off Gates Street. Q. Now where is Liberty Bridge Park located? A. Liberty Bridge Park is located on Marcy Street just off Newton Avenue. Q. And where is Prescott Park located? A. That is also on Marcy Street just off Court Street. Q. And where is Goodwin Park, the park, I'll ask you where is Russell A. Hanscom Park located? A. That is in the section of town or city known as Atlantic Heights and it's just off Kearsarge Street, it's at the intersection of Ranger Way and Kearsarge Way and forms a little triangle with, looks like Baldwin Way. Q. Now then, where is the park in question, Goodwin Park, located? A. Goodwin Park is located off Islington Street just opposite Rockingham

Street, Cornwall Street and Langdon Street which go off Islington Street. Q. And is Goodwin Park located in the center of the business district for the City of Portsmouth? A. I would say no. Q. Well where is it with reference to the business district? A. Well it's I would say west of the business district. Q. All right. But does a public route go by it, one of the main thoroughfares? A. Yes. Q. Which route? A. Islington Street. Q. You said road? A. I said yes to that. Q. Road. A. There is route 101, whether that goes by there or not I don't know. Q. But anyway this is a thoroughfare in the City of Portsmouth? A. Yes. Q. Located you say a little west of the business district? A. Yes. Q. Would you tell us whether the map I have shown you with the various arrows indicating the various parks you have identified, are those parks located at approximately the spot and location shown on the map? A. I would say yes. *Mr. Covington:* We offer into evidence the map that has been identified by the witness as the Defendants' Exhibit number 1 or A. *Court:* It isn't marked as yet. Been identified by the witness, if there is no objection it will be marked Defendants' Exhibit A. *Mr. Reinhart:* No objection. (Marked Defendants' Exhibit A) Q. (*By Mr. Covington*): Do you have a record of the permits that have been issued by the City of Portsmouth in the last five years for the holding of meetings in the public parks? A. Well if I can answer that indirectly I have only been in office one year and I have never investigated to see whether I have the permits going back five years so I don't know. Q. Do you have any of the permits or records of permits in your possession now in Court? A. Yes. Q. You do? A. With me in my possession? Q. Yes. A. No sir. Q. Would you mind getting those permits for us, records of permits for us? A. Right now? Q. When you get through from the stand if you can get them brought here, have someone in your office bring them here and then when we resume following lunch you can take the stand again and explain about those permits. A. Yes. *Mr. Covington:* All right sir. *Mr. Reinhart:* You mean just permits to hold meetings? *Mr. Covington:* Meetings in various parks. A. I will have to bring them all. They're not segregated. Q. All right, bring them all and we will go into that following the noon recess.

Court: Where are the records, in Portsmouth? *Witness:* In the City of Portsmouth. Q. (*By Mr. Covington*): Now were you in office when Mr. Derrickson made an application to use these premises? A. Do you have the approximate date? Q. May 4th in the year 1950. A. No I was not. Q. You were not. I show you Defendants' Exhibit B for identification and ask you if that is not what it purports to be, an agenda of the City Council meeting for May 4th, 1950? A. It appears to be. *Mr. Reinhart:* No objection. *Mr. Covington:* Defendants' exhibit— *Court:* Let me see it. (Mr. Covington at bench) *Mr. Covington:* I will have it attended to later. That's all. *Court:* Any further questions? *Mr. Reinhart:* No further questions.

Forrest E. Hodgdon, Jr. Sworn. Mr. Hodgdon, called by State, being duly sworn, testified as follows:

Q. (*By Mr. Reinhart*): What is your name and address? A. Forrest E. Hodgdon, Jr., 64 Hill Street, Portsmouth, New Hampshire. Q. Are you a police officer of the City of Portsmouth? A. I am. Q. And on June 25th, 1950 did you arrest the defendant Derrickson? A. I did. Q. Where was he at that time? A. Goodwin Park. Q. What was he doing? A. Having an open air meeting. Q. What did you do when you first arrived at Goodwin Park on that day? A. I asked Mr. Derrickson if he had a permit. Q. What did he say? A. Mr. Derrickson said no he had no permit. Q. What did you say? A. I told Mr. Derrickson that he had to stop the meeting where he had no permit. Q. What did he say to that? A. Mr. Derrickson told me that the only way that he would stop is that I would have to place him under arrest which I did. *Mr. Reinhart:* You may inquire.

Cross Examination Q. (*By Mr. Covington*): Officer, was Mr. Derrickson creating a disturbance, was he using any loud or profane language? A. No I would not say he was using any profane language, no. Q. All right sir. Now was he agitating the people to fight? A. Not when I arrived there, no. Q. When you heard him he was acting gentlemanly I suppose? A. Yes. Q. All in the world he was doing was talking to an audience on a bible subject, isn't that

correct? A. That's right. Q. Did you hear anything that he said? A. No I didn't. Q. Not a word? A. No I couldn't recall. Q. You cannot at this time recall anything you heard him say, is that it? A. No. I know he was preaching the gospel but as far as what I heard him say I couldn't tell you. Q. But he did tell you he was preaching the gospel, did he not? A. Beg pardon? Q. He did inform you that he was preaching the gospel, did he not? A. No he didn't inform me, no. Q. But you knew that, that he was preaching the gospel, is that right? A. Yes. Q. All right sir. Now tell us what transpired, did he talk to you or you talk to him? A. Yes, I tapped him on the shoulder and he turned around and asked what he could do for me. I asked him if he had a permit. Q. He was talking to an audience, was he not? A. Yes. Q. There were several people in the park listening to him? A. That's right. Q. About how many were standing around there? A. Oh I would say approximately twenty to twenty-five, I didn't count them. Q. And Goodwin Park is a pretty good sized park, isn't it? About quarter of a block in size or half a block in size? A. Well it's a pretty good sized park, yes sir. Q. Was Mr. Derrickson and his group of listeners taking up all the park? A. No. Q. They were only in a little section of it, were they not? A. That's right. Q. Were they under the trees in the shade? A. I believe they was right in front of the monument. Q. In front of the monument? A. That's right. Q. The monument is in the center of the park, isn't it? A. I believe it is. Q. And other people could walk around in the park, could they not, while the meeting was going on? A. Oh yes they could. Q. There were other people in the park that were not in this group, were there not? A. I believe there were. Q. Sitting on the benches? A. I didn't take too much particular— Q. Sir? A. —look in the other part of the park. Q. There was no one in the park that complained to you about Mr. Derrickson being in the park? A. No I had no complaint from the park. Q. From anybody in the park? A. No. Q. That's right. And he didn't try to drive anybody else out of the park or keep them from using the park, did he? A. I don't think so. Q. And your only complaint against him was he did not have a permit, is that right? A. That's right. Q. In the City of Ports-

mouth it's necessary for anyone to have a permit before he can have a meeting in the park, isn't that right? A. That's right. Q. Under the ordinances? A. That's right. Q. Some meetings have been held with permits, have they not? A. Well I couldn't tell you. Q. You are not familiar with that? A. I'm not familiar with that. *Mr. Covington:* All right sir. That's all.

Mr. Reinhart: The State rests, your Honor.

Mr. Covington: Mr. Poulos, will you take the stand?

Mr. Reinhart: Excuse me just a moment. Will you need Officer Hodgdon again?

Mr. Covington: I don't think so.

William Poulos Sworn. Mr. Poulos, defendant, being duly sworn, testified as follows:

Q. (*By Mr. Covington*): Will you please state your full name sir? A. My name is William Poulos. Q. Where do you live? A. I live in Manchester, New Hampshire. Q. What is your occupation? A. My occupation is that primarily a minister of the gospel. Q. What is your secular avocation? A. My secular avocation is that of a carpenter. Q. Your vocation is that of a minister, is that correct? A. Yes sir. Q. In what organization do you perform your duties as minister? A. With, I work in conjunction with the Watchtower Bible and Truth Society otherwise known as Jehovah's witnesses. Q. The Watchtower and Truth Society is a religious corporation, is it not? A. It is. Q. It acts as the legal governing body of the unincorporated groups of missionary ministers known as Jehovah's witnesses? A. That is right. Q. Jehovah's witnesses are an international group? A. They are to be found throughout the entire world. Q. And the headquarters of the society that does the work of Jehovah's witnesses is located in Brooklyn? A. That is right. Q. Jehovah's witnesses are also in New Hampshire, are they not? A. They are at the present time and have been for a good many years. Q. There are congregations in all the big cities, are there not? A. Yes there are. Many of the small ones as well. Q. I didn't hear? A. And many of the small ones as well. Q. There

are congregations in both the large and small cities of New Hampshire? A. Yes. Q. Now what congregation of Jehovah's witnesses are you affiliated with? A. With the Manchester, New Hampshire congregation. Q. And are you familiar with the congregation of Jehovah's witnesses located at Portsmouth? A. Yes I am sir. Q. And in the summer of 1950 did you have occasion to deliver a public talk at the invitation of the Portsmouth, New Hampshire congregation of Jehovah's witnesses? A. I did have occasion. Q. Who invited you to deliver the talk? A. The company servant of the Portsmouth congregation, Mr. Derrickson. Q. You mean he is the presiding minister of the Portsmouth congregation, is that correct? A. That is quite correct. Q. Now did he telephone you or write you as to the time and place that you would be expected to deliver a talk to the people here in Portsmouth? A. He extended an invitation through the mail. He wrote me. Q. And what was the subject that you were to speak upon? A. The advertised topic was "Preserving Godliness Amid World Delinquency". Q. What date was it that you were to deliver your talk? A. It was July the 2nd on Sunday July 2nd. Q. Of 1950? A. Of 1950. Q. At what time was it? A. Three o'clock in the afternoon. Q. Tell us what took place from the time that you arrived in Portsmouth, what you did, where you went to and how it was that you, and what you did after you got there and what you saw. A. Yes? Q. And what you said. A. When I arrived in Portsmouth by the use of a car, I drove my own car to Portsmouth from Manchester and I arrived at Goodwin Park just about fifteen, perhaps twenty minutes before the scheduled talk was to start. I was met by a Mr. Robert Smith. Q. Who is he? A. Mr. Smith is also one of the Jehovah's witnesses. Q. Associated with the Portsmouth congregation? A. Portsmouth congregation. Q. All right. Tell us what took place. A. Well we waited until the appointed hour and precisely at three o'clock we began our talk, I began to talk to the— Q. Well, wait a minute. Before you started talking did you have a group of people assembled there? A. Yes there was a group of people. They congregated at the base of the monument. Q. Yes and you were standing with your back to the monument? A. No, I was facing the monument. Q. About how far

were you from the monument? A. Well I would estimate about fifteen to twenty feet. Q. Between you and the monument was this group of people in the park, is that correct? A. That is correct. Q. Now tell us whether you had a permit or not? A. I had no permit. Q. All right sir. Previous thereto application had been made for permission for Jehovah's witnesses to use the park, is that correct? A. An application had been made to the Council, that is right. Q. And denied. Now will you please tell us what took place while you were in the park there in your own words, you tell the Judge what you did and what you said, the substance of it, you don't have to use the exact words. A. Well as I started to say a moment ago, at three o'clock I began my scheduled talk. I had on hand my bible and a few notes at the time to make coherence and I in front of the audience that was congregated at the base of the monument, some of them sat on the curb of the monument, and I began to talk on the advertised topic. I began to explain to them the reason for such a talk, what necessitated it. Told them that they were quite aware of the delinquency raging throughout the world. I showed by chapter outline how the delinquency which is rampant upon the earth has come to its apex having been increasing by generations down through the ages even so very wicked at one time in the days of Noah that God saw fit to destroy that generation of people, and the purpose of that talk, what it has in store, is endeavoring to work out through a congregated lot of people today is to inform the people of the coming diaster, world disaster, the approach of the great cataclysm of Armageddon the Bible refers to it as a great day of God Almighty and it is absolutely necessary for people to take an intelligent stand in the light of truth and religion, to turn aside from the ways of the world and take our aid to people in this connection. We just didn't wish it, you have to appeal to their intelligence. That was the gist of my conversation or talk to the people up until the time of the police officers. I had a few more words relative to that subject. Q. What did you say? A. Told them means God has provided, no way of disturbance, that is to be found throughout the entire world as kingdom of God, that no form of government over that, in other words, God rules. My purpose in stating that was to show them it was not the

plans of Jehovah's witnesses to ignore this rule but simply to inform the people that God's divine. As far as I can say the audience was very attentive. There was no disturbance and they seemed to appreciate all what was being said. Q. You say there was no disturbance, did you use any abusive or profane language throughout your talk? A. No sir. Not at any time. Q. Did you talk unduly loud and annoy other people in the neighborhood by your tone of voice? A. I must say that I didn't because I had difficulty of being heard what I had to say even at that time. Q. You mean your audience that was immediately around you within the circumference or within the distance had difficulty, is that correct? A. Yes. Q. But in any event did you prevent anybody else from using that park? A. I did not. Q. Did any person in the park come to you and object to your being in the park? A. No sir. Q. Now were you allowed to finish your talk? A. No, I proceeded then about ten minutes or fifteen minutes before I was encountered by the arresting officer. Q. Tell us what took place. A. As in the case of Mr. Derrickson the officer tapped me on the shoulder, I turned around toward the officer. Q. Officer tapped you as he did Mr. Derrickson, is that right? A. Yes. Q. Tell what occurred, what you said and what was done. A. I asked him, he asked me if I had a permit to deliver the talk, I informed him that I didn't have a permit. I also told him one wasn't necessary because we have our constitutional right to speak especially on a Bible sermon. And he wasn't too concerned with that, he had a duty to perform he told me. Q. Can you tell us what took place after that? A. He asked me to accompany him to the police station stating I was under arrest because I told him I could not possibly leave the congregation there until I had concluded my talk and he said it would be impossible to conclude, words to that effect, I don't exactly remember, and he said that I would have to be put under arrest and I was put under arrest and taken to the police station in his police cruiser. Q. Did you attempt to show him or have conversation with him about Mr. Derrickson having attempted to get a permit from the City Council? A. When I got to the police station. Q. Tell us what took place. A. I told him Mr. Derrickson some time previous, to this particular occurrence had applied for

a permit. Q. In behalf of Jehovah's witnesses? A. In the name of Jehovah's witnesses. Q. For this particular talk? A. Yes. Q. What took place, what was said about that, what did you say? A. I recall the officer's name, it was Mr. Whitehouse. I told him the preview of our meeting, it was for giving a message regarding the kingdom of God and that we had a perfect right, I followed the same line of conversation I had in the park, that we had a perfect right to do such a, right to preach the gospel, conduct an open air meeting, I told him, and he didn't seem too opposed but he said that he had no jurisdiction in the matter and that I would have to talk with his superior officers. I informed him the reason I told him that the matter is vital, various individuals should know about it. That is the reason I did tell him that. Q. Now Mr. Poulos, the talk that you had to deliver, had you been able to finish it what concepts did it relate? A. Well the subject itself, as I said in previous testimony, it dealt with this delinquent situation in the world, delinquency in every form which is to be found today, I guess nobody will dispute that fact, and I would have told the people that from the, God's creation more or less such condition has been upon the world and it has been instilled in the men, men who do not listen, have no proclivity towards the words of Almighty God and they have been carrying on this campaign of delinquency and in order to oppose the works of Almighty God. I would have told them further that the purpose of that, that they allow these things to continue without interference is because He has a definite purpose to show. The bible shows that, ordinances of the bible, the bible shows God has foreseen about all this, that those who are in this part of the universe, because this is where deliquency first arose, and Almightly God, and try to sweep the world in deliquency, that we should not be perturbed unduly about these conditions because we know fully well we have God's word that he is going to cancel them out forever. The means he takes to do this, I would have further told them the means he takes to do this is through the kingdom of heaven, we pray for that kingdom and the model prayer which we are instructed by Christ Jesus when he said, "Our Father in heaven, hallowed be your name, your kingdom come", and I believe that and we want other people

to believe it too because we know that is the means by which salvation and an end to all these disturbing conditions would come to an end but before this could be fully accomplished men from every walk and every avenue in life, men of all walks would have to come and pay their obeisance to the Almighty God. That we ourselves are merely heralds and not trying to advocate the overthrow of any form of human government. Yes, and I would have told them it was to their benefit and I have to take a firm stand in behalf of such principles in the word of the Almighty God. Q. All right now then. Would you have said anything that would have tended to create a breach of the peace or disturb the enjoyment of the park by any other person? A. I assure this Court that I would not have. Q. Why was it please that you persisted in your desire to continue talking after the command of the officers that you desist, stop? A. We feel, your Honor, that we are primarily subject to the Almighty God. We try to obey every law that concurs with the will of Almighty God, that does not conflict with the will of Almighty God. We know that this form of government allows its citizens to perform their religious duty uninterrupted and they have a privilege of expressing their views without any form of interference. Whether that is priests or any other forces, and I simply stood upon my constitutional grounds and of course I would like to say that I felt keen responsibility to give this message to those there congregated. Q. In other words you weren't taking the stand just to be defiant? A. No sir, I was not. Q. Incidentally, you were arrested, is that right? A. I was, yes sir. Q. And both you and Mr. Derrickson were tried, that is, prosecuted and convicted together in the Municipal Court here in Portsmouth, is that right? A. Yes we were. Q. And you took appeals, both of you, to this Court? A. Yes. Q. And the charge is of course that you had public meetings in this park without permit from the City Council, is that correct? A. That's quite right. *Mr. Covington:* I believe that's all.

Cross Examination Q. (*By Mr. Reinhart*): Mr. Poulos, had you applied for a permit to the City Council to speak at Goodwin Park? A. I came at the invitation of the local congregation. Q. You didn't answer my question. A. I personally you mean? Q. My

first question, did you apply for a permit to the City Council to speak at Goodwin Park? A. I personally didn't, no. Q. Was there ever a petition filed with the City Council on your behalf for you to speak at Goodwin Park? A. I'm not in a position to answer that question. I don't know. Q. Did you know that there was a municipal ordinance which required the granting of a permit before you could speak at Goodwin Park? A. Yes I was under the assumption that there was that apparent law. Q. And you knew at the time that you did speak that you did not have such a permit? A. That I did not have a permit, that's right. Q. In other words, you knew that to be the law but you still went ahead in defiance of the law? A. I knew that to be the law, that's right, I did go ahead but not in defiance of the law. Q. You, as I understand your position you went ahead on the belief that you had a right to speak in a public park in the City of Portsmouth even though you had never applied for a permit and even though no permit had ever been granted? A. Yes that's right. *Mr. Reinhart:* No further questions.

(Noon recess)

PAUL F. CONNORS Sworn Mr. Connors, called by State, being duly sworn, testified as follows:

Q. (*By Mr. Reinhart*): Will you state your name and address? A. Paul F. Connors, 432 Sherburne Road, Portsmouth, New Hampshire. Q. You are a police officer in the City of Portsmouth? A. I am. Q. On June 25, 1950 did you in company with Officer Hodgdon place the defendant Derrickson under arrest? A. I did. Q. Will you just briefly state to the Court— A. We received a radio call in the cruiser to go to Goodwin Park on Islington Street, that there was a meeting going on. We went to the park and asked a man by the name of Mr. Derrickson if he had a permit to conduct a meeting, he said no he did not. We told him he would have to break up his meeting or else we would have to take him to police headquarters. He says, "Well you will have to take me to police headquarters", continued then to conduct his meeting. *Mr. Reinhart:* That's all. officer, thank you very much.

HERBERT L. WHITEHOUSE Sworn Mr. Whitehouse, called by State, being duly sworn, testified as follows:

Q. (*By Mr. Reinhart*): Will you state your name and address please? A. Herbert L. Whitehouse, 122 Essex Avenue, Portsmouth, New Hampshire, police officer in Portsmouth. Q. On the 2nd day of July 1950 did you place the defendant Poulos under arrest? A. I did. Q. And you will state the circumstances. A. Yes sir. I was in the cruising car and I received a call to go to Goodwin Park, there was an open air meeting being held, and as I approached Mr. Poulos I asked him if he had a permit from the Council to hold such an open air meeting and he told me he did not and I told him he would have to disband the meeting, and he said the only way he would disband the meeting was to place him under arrest so I placed the defendant under arrest and brought him to the station. *Mr. Reinhart:* That's all. *Mr. Covington:* No questions.

Court: I understand the defendants have no objection to this procedure?

Mr. Covington: None at all. You mean the procedure for calling them for questioning?

Court: Yes.

Mr. Covington: None whatsoever.

Mr. Reinhart: The State now rests in both cases, Derrickson and—

Court: You rested before.

Mr. Reinhart: That's right.

Court: Procedure is agreed to by defendants.

NAT S. STEVENS Sworn Mr. Stevens, called by defendants, being duly sworn, testified as follows:

Q. (*By Mr. Covington*): Will you please state your name? I show you Defendants' Exhibit— *Court:* Let's have the witness's name and address. Q. (*By Mr. Covington*): Will you please state your name and address? A. Nat Sidney Stevens, 512 Broad Street, Portsmouth, New Hampshire. Q. Your occupation? A. Superintendent of Public Works. Q. And in connection with what munici-

pality? A. City of Portsmouth. Q. And how long have you served in that capacity? A. Since 1949. Q. Are you familiar with all of the parks in the City of Portsmouth? A. Yes sir. Q. I show you Defendants' Exhibit A which is a map of the City of Portsmouth on which certain parks are named and located by marks as well as the names of the various parks, I ask you to look at that map and tell us whether or not it has marked on it the approximate location with respect to the parks including Goodwin Park? A. Including Goodwin Park? Q. Yes sir. A. It has sir. Q. All right sir. Now what are your duties and responsibilities in reference to the maintenance and use of the various public parks in the City of Portsmouth, New Hampshire? A. My immediate superior, the City Manager of the City of Portsmouth, who has charge of the parks and playgrounds and I am directly under him and assume the responsibility for the maintenance of the parks from him. Q. From him? A. Yes sir. Q. And not the use? A. No sir, I have nothing to do with the use. Q. The matter of use by permit is vested in the City Council of which the Mayor is a member, is that correct? A. That is correct. Q. And anyone desiring to use the parks must apply for a permit, is that correct? A. By petition to the Mayor and Council sir. Q. Mayor and the Council? A. Yes sir. Q. I show you a group of four pictures and I ask you tell us what these pictures represent. *Mr. Covington:* I'll ask that they be identified as C-1, C-2, C-3 and C-4 respectively. Maybe we better have them marked. *Court:* Is there any objection? *Mr. Covington:* All pictures of Goodwin Park. *Mr. Reinhart:* Who took them? *Mr. Covington:* They are by Donald Iverson, free lance photographer. *Mr. Reinhart:* No objection. *Mr. Covington:* It is a professional photographer. *Court:* They may be marked as an exhibit at this time. (Marked Defendants' Exhibits B-1, B-2, B-3, and B-4) Q. (*By Mr. Covington*): On that map there is a spot described as Goodwin Park, is that not correct? A. That is correct. Q. I show you a group of four exhibits being Defendants' Exhibit B-1, B-2, B-3 and B-4 and I ask you to tell us whether or not these are pictures of Goodwin Park from various angles and directions? A. This is Goodwin Park taken from State Street looking across to Islington Street. Q. Yes sir. A. This is

Goodwin Park taken from— Q. Would you identify this one as B, the one you just identified as B-1. Now you have B-2 in your hand? A. It is a picture of Goodwin Park standing in the east and looking a little bit northwest. Taken at the monument. Exhibit B-2. Q. Taking Exhibit B-3. A. Taken from the west toward the east, shows the monument and part of Islington Street, B-3. Taken from Islington Street looking at the monument and shows State Street in the background, B-4. Q. Showing you a group of exhibits C-1, 2, 3, 4. *Mr. Covington:* I suppose you have no objection? *Mr. Reinhart:* What is the purpose of introducing these? *Mr. Covington:* To show whether or not— (counsel talking together) *Mr. Reinhart:* I am not objecting to the photographs as such, I will admit they were taken and properly taken. I'll admit there are these other parks in the City of Portsmouth but I have to raise the objection to being inadmissible as far as this particular issue is concerned. Case of violation of holding a hearing in Goodwin Park, one specific park. *Court:* I think they may be marked unless there is some other objection. That is your only objection? *Mr. Reinhart:* That is my only objection. *Court:* I think they may be marked. (Marked Defendants' Exhibits C-1, C-2, C-3, C-4) Q. (*By Mr. Covington*): Show you the exhibits that I have referred to, being C-1 to C-4 inclusive and I ask you to tell us whether or not these are pictures of the Plains Park located in the City of Portsmouth, also identified on the map? A. C-1 is a picture of the Plains Park taken from the east looking toward the west. Q. All right sir. Thank you. *Mr. Reinhart:* Be all right. Admit they are pictures. *Court:* Perhaps we should have something in the record. *Mr. Covington:* Otherwise we don't know what they are. *Witness:* C-2 is the Plains Park showing the small baseball diamond and looking pretty much toward the north. C-3 is a picture of the baseball diamond and snow fence taken from the west looking toward the east. Q. Yes sir. A. And C-4 is taken from the south looking toward the north from the park. Q. Thank you sir. And I show you now a group of pictures of Lambert Bridge Park being Exhibits D-1 to D-4 inclusive. Just wait sir. (Marked Defendants' Exhibits D-1, D-2, D-3, D-4) Q. Will you please explain to the Judge now what these various exhibits are, D-1 to D-4 inclusive?

A. This shows a view of the park known as the Liberty Bridge Park according to this map. It's not the property of the City of Portsmouth as yet so that we have no maintenance to it and I'm not too familiar with it. I do know that is a picture showing the park which is marked on the map here as Liberty Bridge Park. Q. It's not the property of the City? A. It is not yet. Q. Not a part of the City? A. No sir. Q. Title is in the City, isn't it? A. I cannot answer that except that we have no maintenance of it sir so I'm not sure. Q. You can't be sure whether or not title is in the City but so far as you are concerned it is not yet under your jurisdiction? A. Correct sir. Q. That is because it hasn't been opened up yet for public use? A. As far as the City of Portsmouth is concerned; yes sir. *Mr. Covington:* All right, we will connect it up. *Mr. Reinhart:* Until such time as it is properly connected I will object to it. *Mr. Covington:* We will establish— *Court:* Subject to that— *Witness:* There is another picture showing the Liberty flagpole which is a landmark in the City of Portsmouth. Q. (*By Mr. Covington*): That is Defendants' Exhibit D-4 you just referred to? A. Yes sir. That is an old landmark in the City of Portsmouth. Q. All right. The next exhibit. A. Taken of this Liberty Bridge Park. Q. You have in your hand Exhibit D-2 and D-3. A. That's right. Q. And you just know they are photographs of the park? A. Of that park, yes sir. Q. Which is not yet open to the public? A. Not as far as— Q. For public use? A. That is as far as the City of Portsmouth is concerned. Q. Yes. I show you now a group of pictures of Russell A. Hanscom Park marked as Exhibit E-1 to 4 inclusive, and I ask you to explain to the Judge what each picture represents. (Marked Defendants' Exhibits E-1, E-2, E-3, E-4) A. Exhibit number E-1 is Hanscom Park which is situated at Atlantic Heights and I believe that view is taken from the north looking toward the south. Here is Exhibit E-2 which is taken at the junction of roads on the west side looking toward the east. Exhibit E-3 is taken from the west side, rather from the east side looking toward the west. And Exhibit E-4 is taken from the north side looking pretty much southeast. Q. I show you another group of photographs being F-1 to F-4 inclusive, being photographs of Haven Park in the City of Ports-

mouth, shown on that map, and I ask you to please take each exhibi and explain to the Judge what each represents. (Marked Defend ants' Exhibits F-1, F-2, F-3, F-4) Q. Look on the back of each pic ture first to identify it. A. F-1. To me it is a view taken from th north looking toward the south, shows the monument and also a piec of Pleasant Street. F-2 taken from the north and looking through the park, that would be south, showing part of Pleasant Street. F-3 taken from Pleasant Street showing the monument and looking ap proximately north. F-4 taken from the northwesterly corner of the park showing the monument and southeast. Q. I show you another group of four photographs which are, purport to be photographs of South Park which is identified and located on the map. They are Exhibit G-1 to G-4 inclusive. I ask you to take each and explain to the Judge what appears in each picture, identifying each one by exhibit number first. (Marked Defendants' Exhibits G-1, G-2, G-3, G-4) A. Picture taken from the east toward the west shows some of the small equipment at the playground. Q. What exhibit? A. G-1. G-2 taken from Junkins Avenue and looking east or rather looking west at the park and houses in the background. G-3 to me that is a view, view in the park. And G-4 is taken from the south looking toward the north, shows part of the children's playground and part of the South Mill Pond. Q. I show you another group of photographs which purport to be pictures of Prescott Park that are identified as H-1 to 4 inclusive. I ask you to take each, first identifying the picture by exhibit number, and explain to the Judge what each represents. (Marked Defendants' Exhibits H-1, H-2, H-3, H-4) A. H-1, Prescott Park taken from the south side and looking to the northwest. H-2 taken from the east and looking in a westerly direction up through the park. H-3 taken on Court Street and looking east into the park and showing the water. H-4 taken in the northwest corner looking southeast and showing part of the waterfront. Q. I now show you three photographs apparently taken of Langdon Park located in the City of Portsmouth appearing also on that map before you and I ask you to identify each by exhibit number and then explain to the Judge what each of the three represents. (Marked Defendants' Exhibit I-1, I-2, I-3) A. I-1 of Langdon Park taken

at the south side of the park and looking north, it shows part o Junkins Avenue and Lincoln Avenue. I-2 is a view of Langdon Par looking from Junkins Avenue looking in an easterly direction towar Lincoln Avenue. I-3 is taken at the northeasterly side of the par and Junkins Avenue and looking down across Lincoln Avenue. Q. show you two additional pictures being photographs of Pierce Islan Park that's heretofore been identified on the map situated in th City of Portsmouth, I ask you to take each picture, identifying it b exhibit, and then explain to the Judge what each represents. (Marked Defendants' Exhibits J-1 and J-2) A. J-1 is a view of Pierce Island taken from the remains of the old fort looking in a westerly direction toward the swimming pool. J-2 is a view of Pierce Island that shows the road going out to the old fort and some of the small children's swings are located there. *Mr. Covington:* That's all.

Cross Examination Q. (*By Mr. Reinhart*): Just one question Mr. Stevens. Would you say that Goodwin Park was a large or small park? A. I'd say it was a small park. Q. Can you give us an idea of what the dimensions might be? A. These dimensions are approximate but I would think it was about three hundred feet between Islington Street and State Street and about four hundred feet frontage on Islington Street. Q. To your knowledge has there ever been a permit issued to any organization to hold any meetings on Goodwin Park? A. Not— *Mr. Covington:* Hold on a minute now. We object to that because it calls for conclusion. The best evidence would be the records. We have asked the Clerk to produce them, they are in Court, and rather than to speculate, why there may have been meetings he didn't know anything about. *Court:* It is hearsay. *Mr. Covington:* Not material. *Court:* Witness testified he has nothing to do with granting permits for meetings. I think I will sustain it. *Mr. Reinhart:* That's all. *Mr. Covington:* That's all. *Court:* Do you have anything further? *Mr. Reinhart:* Nothing further.

Mr. Covington: Now then, I would like to conclude the examination of Mr. Derrickson, rather. I would like to begin and conclude it because he is ill.

Court: Yes.

ROBERT W. DERRICKSON. Sworn. Mr. Derrickson, defendant, being duly sworn, testified as follows: Q. (*By Mr. Covington*): Will you please state your name? Please try to talk as loud as you can, Mr. Derrickson. A. My name is Robert Wesley Derrickson. Q. And what is your post office address, mailing address? A. Box 75, Portsmouth. Q. Where have you been living? A. I have been living in the back of Kingdom Hall. Q. That is the meeting place of Jehovah's witnesses? A. That's right. Q. Where was it that you were living, say, in 1950 when this transaction took place? A. I was living in the back of Kingdom Hall at 12 Ladd Street. Q. After that where did you move to? A. Well I lived there until I went into the hospital. Q. Now then, you are presently confined to the Portsmouth Hospital? A. Portsmouth Hospital, yes. Q. Now will you please tell us whether or not you have a serious ailment that will keep you confined there for some time according to the doctor? A. Yes, according to the doctors I have diabetes myelitis and hardening of the arteries, a bad kidney and a muscular heart ailment, that is, destructive hardening of the muscular part of the heart. Q. All right sir. And you are sitting there in the wheelchair, is that correct? A. Yes. Q. That's just for the record. You are a minister of Jehovah's witnesses? A. I am. Q. And your official position is and was at this time of this trouble in the park in Portsmouth presiding minister of the gospel? A. I was a servant and Q. And company servant means presiding minister? A. Presiding minister, yes. Q. You heard testimony of Mr. Poulos about the way the work was carried on? A. I did. Q. Is it the plan and policy of Jehovah's witnesses to hold outdoor public religious meetings in the public parks in the various towns and cities where congregations are located throughout the United States? A. It is part of the world-wide education campaign in the bible to hold outdoor meetings. Q. And that's usually during the warm months of the year, summer months? A. Warm months of the year, that's right. Q. Now in the month of May 1950 in accordance with that uniform policy of Jehovah's witnesses did you make an application to the City Council of the City of Portsmouth for permission to use

any one of their parks? A. I did. Q. When was the application made? Well, it was made in May, April or May. A. It was made in May I think. Q. And a hearing was had on that matter on May the 4th, 1950? A. On Tuesday. Q. Of the City Council in the City of Portsmouth? A. Yes. Q. Where did the hearing take place? A. In the Council Room upstairs. Q. You mean upstairs? A. In the, that is the City Hall and also the Police Station. Q. I show you Defendants' Exhibit J which is an agenda dated May 4th heretofore identified by the Clerk of the City of Portsmouth. *Court:* What is the number? That hasn't been marked. *Mr. Covington:* No, your Honor. *Court:* May be marked K. (Marked Defendants' Exhibit K) Q. (By Mr. Covington): Defendants' Exhibit K shows an agenda of business of the City Council of the City of Portsmouth on May 4th, 1950 on which is listed "petition to conduct public lectures in Goodwin Park, Jehovah's witnesses", showing that there had been a petition filed first with the City Council before May 4th that was to be determined on May 4th. Did you file a written printed petition? A. I did. Q. And in that written printed petition did you show the dates that you wanted to use parks? A. Yes, I listed the dates and the names of the parks, not the names of the parks, that is, Goodwin Park, but I listed the titles of the talks and the dates they would be given. Q. All right. And you listed one I believe as June the 26th, was it not, the day that you were to be here, talk, first talk of a series? A. That's right. Q. Then you listed one for July 2nd? A. That was Mr. Poulos's talk. Q. It was June 25th, wasn't it, 1950, is that right? A. That's right. Q. Then the second talk was July 2nd, 1950. Did you list Mr. Poulos's talk in that petition? A. Yes, I listed his talk in that petition. *Court:* Is the petition here? Q. (By Mr. Covington): You didn't have a copy of it, did you? A. No. *Mr. Covington:* Is the written petition available? *Mr. Bellucci* (City Clerk): I haven't it. *Mr. Covington:* It's not among those applications. All right. Q. Will you please tell us now the title of the two talks you listed? A. Mine was The Pathway to Peace and Mr. Poulos's talk was entitled "Preserving Godliness Amid World Delinquency". Q. In the application did you offer to pay the fee? A. Oh yes. I made particular mentions that I would pay any reasonable fee that would

be demanded and be glad to do so. *Court:* What did the petition say so far as you can remember it? *Witness:* The petition was for the use of Goodwin Park specifically, I mentioned Goodwin Park, and it was for the purpose of delivering bible lectures. Q. (By Mr. Covington): And now on May 4th, 1950 you appeared before the City Council in behalf of Jehovah's witnesses in this petition to use Goodwin Park on these two dates that you have mentioned, is that correct? A. Yes, that's true. Q. Would you please tell us what took place upon the occasion of your appearance before the City Council as best you can remember it? A. Yes. *Mr. Reinhart:* Your Honor please, it seems to me that the record is the best evidence here. Council turned down, denied the permit. That's the result of the procedure. *Mr. Covington:* That may be— *Mr. Reinhart:* I don't think we ought to be obliged to listen to everything that might have transpired at a City Council meeting, at which there were other business or agenda. *Mr. Covington:* I am talking only about this application. May I answer that objection, your Honor, if he is finished? The purpose of this testimony is to show that there was arbitrary and capricious denial of the application and that upon the remarks made by members of the City Council it was a denial based on motives and grounds different from that permitted by law. And the only way that we can establish it is by oral testimony because we have copy of the minutes of City Council meeting of May 4th in reference to this application and it merely shows as follows: "A petition was read from Robert Wesley Derrickson, local group of Jehovah's witnesses asking for the use of Goodwin Park for a series of public lectures on bible topics. Mr. Derrickson spoke briefly as did Councilmen Simes, Leary, Patterson and Mullen. Upon motion of Councilman Simes the petition was denied". And we say that this man ought to be able to testify as to what he said and what the Councilmen said because there is no complete record of the matter of the hearing. There is a record only of the decision reached by the City Council and our purpose is to show arbitrary and capricious determination. *Court:* I am going to let him testify. *Mr. Covington:* All right, your Honor. Q. Now please tell us, Mr. Derrickson, what you said from the time this matter was called. Telling us first what was said when it was called, what you

said and what the various Councilmen said please. A. When it was called to the attention of the Council I stood up and began a formal address to the Council and— Q. When you say you began a formal address to the Council that's all right but the Judge may not know the subject matter of it, what you said, so tell the substance. You don't have to say the exact words. A. The substance. The— Q. The substance. A. The substance of my discussion was that I had the permission to use this opportunity to call to their attention the petition and to speak in behalf of it insofar as it pertained to us holding meetings there in Goodwin Park and I cited some United States Supreme Court decisions as to our use of various instruments of that kind to enable us to preach this message to the people and there was one Councilman there, Leary, he said, "I wonder what he is talking about", I cited the CIO and Schneider case and this Leary said "I wonder what he is talking about", and Councilman Simes said "Oh he is talking about some Supreme Court cases to which I shall presently answer". And then this Councilman Simes said that there was a time when he would be bound by the United States Court decisions but not now, and then the, I believe it was Councilman Simes spoke about the, he said, let me see, I want to get that straight, it was, oh yes, it was Councilman Simes that said, "This is the sovereign State of New Hampshire and when the government tells us to defend it I'll shoulder a musket". And then— Q. Was the man by the name of Mullen on the Council? A. Oh yes, there was Mullens, Mr. Mullens after I had finished with my telling them the reason for the use of the parks which was to inform the people of the good will of the Aimighty God through the bible, He had ordained his purpose to set up a righteous government on earth and that it would bring peace, prosperity and happiness to all mankind. Then this Mr., Councilman Mullens, I said that I was finished and would anyone care to ask me questions and this Mr. Mullens said "If there were, if the City were attacked would you give that speech or would you defend it?" I immediately quoted a Bible scripture but in the hubub and commotion it was lost. Q. They could not hear because of the commotion? A. And they could not hear me, no, and I didn't know until after the whole thing had been finished and I had asked the Miss Foley I believe at the time was the

Clerk, Town Clerk, what the result was did I know whether our petition had been granted. Q. And what was the announcement made upon the petition? A. That it was denied. Q. Was there any statement made about whether they did allow religious meetings in any of the parks in the City of Portsmouth that you remember? A. Yes I believe there was one Councilman there that afterwards said struck the only sane word in the whole discussion, was that it was the policy of the City not to allow religious groups to use the parks. Q. Now then, tell us about your talk, Mr. Derrickson, that you gave. You went ahead, did you not, and gave a talk on the following 25th day of June? A. Following Sunday, yes. Q. The 25th and would be Sunday? A. It was the 25th day of June. Q. In this application to be determined on May 4th you had specified June 25 and July 2nd? A. That's right. Q. For Jehovah's witnesses? A. That's right. Q. The first one scheduled to be given was The Pathway to Peace? A. Right. Q. You told us you gave that talk? A. I gave that talk. Q. Tell us about going to the park and what occurred on that day. A. Well I went to the park about quarter to three for the talk was scheduled for three o'clock and I found a group there and I made preparation for the introduction of the talk, the Chairman was there and I gave him the introduction and at three o'clock I began my talk using, well, following the outline that there was a great lack of peace today in the world and the reason for that lack of peace and result of that lack of peace in my introduction. And then I showed them how peace was wrecked, the great peace wrecker, Satan, the devil in the garden of Eden and I pointed out the result of his leading the human race into pathways that lacked peace and then I showed how it was the purpose of Almighty God Jehovah to bring about a different system of things, a real enduring and lasting peace and that peace was to rest upon the shoulders of his beloved son Christ Jesus and the results that that great peace would bring to mankind was the promise of goodwill and mean everlasting life, health, peace, prosperity and endless joy for all of goodwill toward Jehovah God. And then in my conclusion, well I didn't get to the conclusion, that's right, this I felt a tap on my shoulder about then, in fact I was reading from the thirty-second chapter of Isaiah where it says "Behold

a king shall reign in righteousness and princes shall rule in judgment", and then I felt that tap on my shoulder and I turned and there was an officer of the law there who requested, he questioned me if I had a permit and I said no I hadn't a permit, "Well", he says, "you will have to stop". I says, "I can't stop, this is an important message", and I continued to address my audience and, well, he said, "If you don't stop I'll have to arrest you" and I said "Well that's your responsibility" and so I was taken, placed in the police car and taken down to the police headquarters, station, and booked and placed in a cell. Q. And prosecuted? A. Prosecuted. Q. In the Court below convicted and now you have appealed your case to this Court here, is that correct? A. That is true. Q. I show you a piece of paper that contains Chairman's introduction and ask you if that is what you typed out for the use of your Chairman to introduce you that day. A. Yes that is, this is what I typed out for the Chairman that day. Q. Please read that to the Judge to show what the Chairman said before you began to talk, which you have described? A. Yes. Chairman's introduction. Friends, fellow citizens. The Watch Tower Society that is sponsoring (I will have to get my glasses, pardon me a minute.) The Watch Tower Society which is sponsoring thousands of these public meetings welcome you. This is a message of peace, therefore it is a message of utmost public importance. You are living from day to day in an era that has witnessed two of the most disastrous wars of human history. Peace is desired by all reasonable and God-fearing persons. Because the convenience and use of weapons whose potential power to snuff out lives of millions is now an admitted fact, many have been the schemes brought forth to prevent war and to insure peace. One pathway, however, has been overlooked. It is now my privilege to introduce a representative of the Watch Tower Society who will speak on the Pathway to Peace. Q. All right. Thank you. Mr. Derrickson, at any time did either your Chairman or you in delivering the talk or addressing the audience that day use any language as a, that provoked a breach of the peace or incited people to fight? A. No there was not. Q. Was there any racket or disturbance in the park? A. No there was not. Q. And your audience was orderly, is that correct? A. Audience was orderly. Q. Was

there a peaceful assembly? A. Peaceful assembly. Q. Other people were not barred from the use of the park by your little group being there, was it? A. They were not. Q. Did anyone in the park that were outside of your audience come to you and object to your using the park? A. No they did not. *Mr. Covington:* All right, that's all, your Honor.

Cross Examination. Q. (*By Mr. Reinhart*): Mr. Derrickson, you have testified that you were asked one question by Councilman Mullen as to whether or not you would defend your country. Outside of that question that was asked you by a member of the Council were you asked any other questions by any other members of the Council? A. I cannot recall at the present. Q. But you do remember distinctly one of the members of the Council stating to you that the, it had been the policy of the Council not to issue permits to any religious organization. You do recall that? You just testified to it, haven't you? A. Yes. Q. Do you recall which member of the Council it was that issued, that made that statement? A. I can't remember the gentleman's name, no. I can't now. Q. You recall what part of the Council table he was sitting at? A. No I can't recall that either. *Mr. Reinhart:* That's all. *Mr. Covington:* That's all.

Mr. Covington: I might say this. If Mr. Derrickson is willing for the trial to proceed in his absence if the Court will allow him to return to the hospital. *Court:* Are you willing that we should go ahead? *Mr. Derrickson:* Oh yes. Q. (*By Mr. Covington*): You are willing for us to go ahead and proceed with this trial in your absence? A. Yes. Q. Under the law we can do it if you consent to it in this type of a case. A. Yes. Q. You have no objection? A. I have no objection. Q. Would you like to go back to the hospital? A. It's not particularly myself but if you direct me to. Q. We don't direct you but if you see no reason and desire to stay here we don't ask you to go. A. I'd just as soon stay. Q. All right. Is this too strenuous for you? A. No.

THOMAS F. MULLEN, SR. Sworn Mr. Mullen, called by de-

fendants, being duly sworn, testified as follows: Q. *(By Mr. Covington)*: Will you please state your name? A. Thomas Francis Mullen, Sr. Q. Mr. Mullen, what is your occupation? A. Salesman. Q. In connection with what organization? A. Port City Beverage Company. Q. How long have you lived in the City of Portsmouth sir? A. About thirty odd years. Q. And of course you have an official position with the City of Portsmouth, do you not? A. An official position? Q. Yes? A. Elected Councilman, yes. Q. Were you sitting on the City Council May 4th, 1950 when the matter of application of Jehovah's witnesses came before the Council? A. Yes sir. Q. Do you recall what took place on that day fairly clearly? A. I do. This gentleman, reverend gentleman that just spoke had a petition read and I took the floor regarding the petition. I learned from one of the brother Councilmen it was already on the books which I did not know. Q. What do you mean, already on the books? A. It was an ordinance passed, passed and recorded in the City Council. Q. An ordinance had been voted? A. The Councilmen had voted their ordinance. Q. Requiring permits before people could hold meetings? A. I believe that's right, yes sir. Q. Now then, you knew this was an application for a permit addressed to the City Council? A. Yes sir. Q. When the petition was called before the Council who spoke first and begin with the first speaker and end with the last one. A. That I don't recall. Q. All right. Just tell us the substance of what you remember as it occurred being said there and I'm not going to hold you to saying the exact words or putting it in its exact order but try to get it somewhere close to the exact order in which it occurred. A. I remember that I took the floor, Judge Simes had taken the floor previous. Q. Who? A. Judge Simes. Q. What did he say? A. I believe he made the statement that the discussion is unnecessary due to the fact that ordinance was already on the books and that at no time had the City Council ever granted a privilege to any religious organization to use any of the City property. Q. Any of the parks? A. That may not be verbatim but that is my recollection. Q. They didn't allow religious meetings upon any City property? A. That they hadn't. Q. That they hadn't? A. That they hadn't, I believe that is what Judge Simes

said. I took the floor and asked this gentleman, it would have had no ruling on my vote on the ordinance, asked him in case he was speaking in Goodwin Park or any City property if the City should have been attacked would he do anything to stop it. I don't remember using the word "fight". I meant by that would he do anything possible in his power to defend the City and I believe he quoted scripture, the verse I don't recall. I sat down immediately after his statement. Q. And of course his attitude and his statement angered members of the Council, didn't it? A. I won't say that. No I don't think there was any question of anger. I don't think the question was vital enough to cause— Q. Why was the question asked? A. I asked the question personally. Q. What for? A. Well it was my belief that in the United States, may I give my own interpretation? Q. Sure, go ahead. A. In this country when people are granted such liberties and such pursuit of happiness that I certainly believe, my own conviction, regardless of their religious belief which I honor any man whether he is with me or no, I'll give him credit for believing in God in any way he chooses as long as he believes in that God. I do firmly believe that any man or person in case of an attack should do something to help his home and his country who been attacked and that is the spirit that I can give for my statement. Nothing personally against him for his judgment. It had no feeling against the gentleman or his belief, that was my heartfelt feelings for that statement sir. Q. Well if it didn't have any bearing why did you bring it into the Council meeting sir? A. The only reason I brought it into the Council meeting because this gentleman was asking a motion of the City and I thought it was a fair question to ask him which I would ask any man of my own belief if he had been there. Q. You don't believe a person who won't defend his country by bearing arms should be out on any of the parks, is that right? A. I didn't mention anybody bearing arms. A man doesn't necessarily have to bear arms. Q. Do anything? A. I didn't include arms. As far as the word fight I don't remember. Q. It was your belief then that a man who would not do anything wasn't entitled to use the park, is that it? A. Why yes. That doesn't reflect the view of the Council. That's my own personal views. Q. Did that cause you to make the ruling

that you made in this case which was that he shouldn't have the use of any of the parks or was it because of the policy not to allow anybody's organization not to use any of the parks of the City of Portsmouth? A. I didn't make the ruling? Q. Didn't you vote on it? A. No I did not vote on the question. Despite what the record may say I waived the question myself. Q. The record shows that you voted. A. Well that might be but I don't recall it. I wouldn't have voted on it. Q. You would not have? A. I'd like to further that by saying that I think as far as discrimination goes that was very very remote from my mind. Q. So you did not vote on it? A. I didn't intend to vote on it. If I made a misstatement it is a misstatement. I weighed the question very heavily sir. I don't believe in denying any religious body any privilege. Q. Was this the first time that you ever learned that they did not allow religious groups to use any of the parks in the City of Portsmouth? A. No, I learned that night when the question was coming up that that way in the City of Portsmouth that in cooperation of this ordinance I have learned that City of Portsmouth never granted permission to any religious body to use any of its public parks. Q. For religious meetings? A. For religious meetings. Q. Or gatherings? A. What say? Q. Or gatherings? A. Or gatherings. *Mr. Covington:* Or gatherings. Was there anything else? That's all. *Mr. Reinhart:* No questions.

Frank E. Patterson Sworn Mr. Patterson, called by defendants, being duly sworn, testified as follows: Q. (*By Mr. Covington*): Will you please state your full name and your address and your age and occupation? A. My name is Frank E. Patterson, 733 Middle Street, Portsmouth, my age is fifty-two, and my occupation is building contractor. Q. What official position, if any, do you have? A. City Council. Q. Where do you reside? A. 733 Middle Street. Q. Will you please tell us whether you were a member of the Council on May 4, 1950? A. I was, yes sir. Q. Were you present when the matter of the petition presented by Jehovah's witnesses to the Council for permission to use one of the city parks of Portsmouth for the holding of religious meetings on June 25 and

July 2nd, 1950 was considered by the Board? A. I was there, yes. Q. Would you be kind enough to tell us what took place as best you recollect it from the time the petition was called to the time it was passed upon or voted upon? A. Well as I recall the petition was read by the Mayor and opened for discussion and I think that the, I believe Mr. Derrickson, is it? Q. Yes. A. I believe— Q. Derrickson. A. —rose and asked if he could be heard. He, I know that he continued to hold forth on what I call in my own mind irrelevant to the situation, sort of dragged out procedure. And eventually, I can't recall whether he was asked to stop or just what happened but I do know Councilman Simes made some remarks concerning the Supreme Court order. I recall Mr. Mullen's remarks that he just stated here. Q. Sir? A. I recall Mr. Mullen's remarks already stated. Q. Would you please repeat them? A. That he asked after Mr. Derrickson had talked, somebody asked, he rose and asked what he would do or if he would defend his city if he were attacked. Q. Did that have any— A. That brought forth more or less of a bible discussion and after that got around to voting and the vote was unanimous in denying the petition. Q. Why was it that you denied the petition? A. Because sir we have denied them previous meetings, we had already denied other religious groups and would not set a precedent by granting permission such as that to any religious group. Q. You say other religious organizations— A. We have, yes. Q. May I finish please? I'm sorry. A. Surely, I'm sorry. Q. Do you say other religious organizations have been denied the right to use any of the city parks for meetings? A. City parks and streets, yes. Q. City parks and streets— A. Yes. Q. —in the City of Portsmouth? A. Right. Q. What religious groups were there involved in those denials? A. I believe we have been requested, petition from Mormons, Adventists. Q. Seventh Day Adventists? A. Seventh Day Adventists, that was previous years, years previous to 1948 and 49, several others, I'm not sure, I think the Church of God and Christ have petitioned. We denied them. We denied other organizations. Q. Well now, it is a fact of course that religious organizations had never been granted permission to use any of the city parks, is that correct? A. To my knowledge that is right. Q. That isn't a written policy

or a written ordinance, but it is an unwritten policy of the City Council not to grant permits under the ordinance? A. I can't cite you the ordinance but probably a fact and— Q. You were not here this morning but the City Clerk who had that book of ordinances in his hand and which book is now before you shows only this one ordinance which I will call to your attention in reference to the use of the parks. It's article seven, section twenty-two which has been heretofore read into the record. He testified that that was the only ordinance on the books of the City of Portsmouth in reference to the use of parks. A. Apparently, yes that may be true. Q. Then— A. That may be true. Q. Then the policy not to grant permits to religious organizations is not written into any ordinance of Portsmouth but it is the policy of the Council not to allow them? A. I believe according to law it is up to the Council to grant any permit. It is up to the judgment of the Council. Q. If the Council wanted to grant permits to religious organizations it could for there is nothing in the ordinance to prohibit them? A. According to the ordinance, no. Q. That is the only ordinance, isn't it? A. I won't say so. Q. Assuming the Clerk's testimony to be true it is the only ordinance, isn't it? I'm not asking you to— A. I don't know. Q. Let's for the sake of argument assume what the Clerk said is true, that is the only ordinance, then there is nothing in that ordinance to prevent you and other members of the Council allowing any religious organization to use any of the parks? A. As far as reading— Q. Sir? A. That is right. Q. If you wanted to grant it to them you could, couldn't you? A. Oh yes. Q. It rests in the absolute discretion of the City Council to say whether a religious organization can or cannot use the parks? A. That's right, yes. Q. And this policy that you testified to applies to every one of the parks in the City of Portsmouth, doesn't it sir? A. Yes I would assume so. Q. And it's not limited to any one particular park, is it? A. No. Q. It applies to all of them? A. As far as I know. Q. Well now, can you explain to the Judge why it is that the City of Portsmouth has this policy to deny religious organizations, that discretion of the Council, permission to use any of the public parks in Portsmouth? A. Can I describe the only reason— Q. You may. A. My reason would be sir, that once we set

a precedent we would be pestered almost continuously by other organizations, my experience in the Council perhaps four years, we have various organizations from out of town petition for tag days for various things which they would have us continuously in not water over it. Matter of setting up the precedent and the only reason for voting against it would be it would not set a precedent giving one organization and another presented a similar request, and as I say, we would be continuously, we could not deny any, in order to deny all or any of them we had to deny all. Q. In other words, you haven't got an ordinance on that book that makes it mandatory and the way you Councilmen interpret that law, there's nothing in that ordinance there that would compel you to give a religious organization a permit, is there? A. I have already stated. Q. I am asking it again. A. Again yes, nothing. Q. There is nothing in that ordinance according to the interpretation you have placed that would compel the City Council to give a permit to any religious organization to use any of the parks. That's right? A. That's right. Q. In the exercise of your discretion in the enforcement of that law you have adopted the unwritten policy not to allow any religious organization to use the parks for if you allow one you must allow all? A. That is correct. Q. That is the only reason? A. That is my reason. Q. And that apparently could be one of the other reasons of the other Councilmen, couldn't it? A. I speak for myself only. *Mr. Covington:* All right, you speak for yourself. That's all.

Cross Examination Q. (*By Mr. Reinhart*): Councilman Patterson, was this meeting in question at which the vote was taken on the Derrickson matter an orderly conducted meeting? A. Oh yes. Q. Was it conducted in a dignified manner? A. That's right. Q. Whether or not it is a matter of right in Council meetings to call upon a petitioner to express his views or whether it is just a matter of courtesy? A. It is a matter of courtesy. Q. Whether or not that courtesy was extended to Mr. Derrickson at this meeting? A. It was extended but I don't recall whether it was by request of Mr. Derrickson or by the request by the Mayor asking Mr. Derrickson. Q. He was given the privilege? A. He was given the privilege to

speak one way or another. Q. Although that was not required as a matter— A. No that is not required, matter of courtesy. Q. Whether or not your vote in this matter was influenced in any way by any remarks that might have been made by Councilman Mullen or other members of the Council? A. No. It's automatic, goes through, as I say, I only used my own vote only because I didn't want to set a precedent. That is my reason. *Mr. Reinhart:* No further questions. *Mr. Covington:* That's all sir.

(Short recess)

Lester R. Whitaker, M. D. Sworn Dr. Whitaker, called by defendants, being duly sworn, testified as follows: Q. (*By Mr. Covington*): Will you please, doctor, state your full name, your profession? A. Lester R. Whitaker, physician. Q. And your address? A. Address— Q. Business address and home address. A. My business address, 97 Chestnut Street, Portsmouth. My home address, Brackett Road, Portsmouth. Q. What official position, if any, do you enjoy with the City of Portsmouth? A. You ask me, you use the word "enjoy". Q. Or do you have? A. City Councilman of Portsmouth. Q. Were you on the City Council on May 4, 1950? A. I was. Q. And you of course having been in the courtroom this afternoon and having heard the testimony know that this involves the application made by Mr. Derrickson in behalf of Jehovah's witnesses to hold religious meetings in one of the parks in Portsmouth, you know that? A. I do. Q. You recall the application, do you? A. I do. Q. Will you please tell us what occurred from the time the petition was called for consideration until such time as it was ruled on? Giving us the substance of what you remember was said either by you or any of the other persons in your hearing? A. The petition was read by the Mayor, there was discussion and as I remember it the discussion was as has been presented here, I can't remember any— Q. —Thing to the contrary? A. Anything to the contrary. Q. Now is there anything that you might add, Dr. Whitaker? A. I don't understand your question. Q. Well I mean is there anything in addition to what has been said that you would like to add or can add? A. No, I think that Council-

man Patterson's statement that that had been the policy of the City Council to grant no permits for religious organizations to hold meetings on city property— Q. And of course that would mean any of the parks in the City of Portsmouth, is that correct? A. Yes. Q. In other words, the City of Portsmouth has not taken from among its public parks any one park and said religious meetings could be held here and not over here, they just deny them to all, is that right? A. As I understand it that is right. Q. And the reason is probably — A. But I would like to add there that I don't remember that request had been made for other parks. Q. All right. But you do remember the testimony that Mr. Patterson gave us about other organizations having been denied it the year before and the year before that? A. Yes. Q. The Seventh Day Adventists and some other religious organizations? A. I don't remember the Seventh Day Adventists. I remember the Mormon. Q. The Church of God and Christ? A. And I remember that, the Church of God and Christ. Q. Now the petitions have never been denied because there is some particular park designated for religious meetings in Portsmouth but because it is the policy of the Council not to allow any religious meetings and speeches on any of the city park property, is that right? A. Any of the city properties, streets or parks. Q. And as stated, there is nothing written in the ordinances of the City of Portsmouth but that is an unwritten policy that is adhered to by the City Council, is that correct? A. That is as I understand it. Q. An unwritten policy. The only thing that's written is that particular ordinance there, is that correct, which has heretofore been referred to as the one authorizing the City Council to grant permits or reject them, being section seven, section twenty-two and twenty-three and twenty-four and twenty-five of the ordinances of the City of Portsmouth. A. Now your question? Q. The question is this, doctor. The Clerk has testified that's the only ordinance on this subject in the ordinance book. A. Yes. Q. And the question I put to you, this policy of refusing permits to all religious organizations is, as you stated it, a matter of unwritten policy rather than anything that's written to be found in the ordinance book, isn't it? A. That's true. Q. And it comes about as the result of the exercise of the discretion that is invested by that

ordinance there in the City Council, is that correct? A. I'm not sure that it's limited by that ordinance. Q. I'm not saying it is limited but that is the only ordinance. There is, we will all admit that the Council has certain discretion, don't they? A. Yes but the Council is given the discretion by some law I believe. Q. Well that is the law. A. I believe it is some law beyond that. Q. And, well the statutes of New Hampshire authorize that law, you understand that? A. Yes. Q. And that is really the law which is the New Hampshire statute but this is a local city law enacted by virtue of the State statute. You understand that? A. Yes I do. Q. Now then, the point I am getting at is the denial is in the discretion of the City Council, isn't it? A. Yes. Q. In other words, there is no written law that says that any religious organization can use any of the parks, is that right? In other words, the ordinance doesn't provide for religious use of parks, does it? A. That's right. *Mr. Covington:* That's all, doctor. *Mr. Reinhart:* That's all. *Mr. Covington:* You may be excused as well as the other gentlemen I called if you care to. Those who want to go who have been called to the stand.

Mr. Covington: Is Councilman Butler here?

THEODORE R. BUTLER Sworn Mr. Butler, called by defendants, being duly sworn, testified as follows: Q. (*By Mr. Covington*): Please state your name? A. Theodore R. Butler. Q. And your address? A. Home address, 973 State Street, Portsmouth, New Hampshire. Q. Your business address? A. 17 Daniel Street, Portsmouth, New Hampshire. Q. Your occupation? A. Insurance and real estate agent. Q. What official position, if any, do you have with the City of Portsmouth? A. Member of the City Council. Q. And were you such a member on May 4th, 1950? A. Yes sir. Q. You remember the Jehovah's witnesses petition for permission to have religious meetings in one of the parks? A. I do. Q. You have heard the testimony of the other gentlemen? A. I have. Q. Is there anything that you would like to add or take from what they have said? A. No, I think they have been rather accurate in their description of it. Q. Your testimony would be the same, is that correct? A. Yes sir. Q. For the reason of denial of the petition, is that correct sir? Namely—

A. Yes, I understand. Q. That it is the policy of Portsmouth not to allow religious meetings on any of their city properties? A. That is correct, yes sir. Q. Just for the sake of the record, subpoenas have been issued to Mr. Neal and Mr. Simes. They are ill and cannot attend, is that correct? A. I do not know. Q. Mr. Neal is out of town and Mr. Simes is sick? A. I do not know. *Mr. Covington:* Can we not so stipulate? *Mr. Reinhart:* Yes that is correct. *Mr. Covington:* All right, that is all. *Court:* Have you any questions? *Mr. Reinhart:* No questions.

JOHN J. LEARY Sworn Mr. Leary, called by defendants, being duly sworn, testified as follows: Q. (*By Mr. Covington*): Will you state your full name and your address and your occupation? A. John J. Leary. Grocery store owner and manager. Q. Where? A. Portsmouth. Q. And what position do you have with the City of Portsmouth? A. A member of the City Council, also member of the State Legislature. Q. Do you live in Portsmouth? A. I do. Q. Were you on the Council May 4th, 1950? A. I was. Q. You have heard testimony of the other gentlemen given about the denial of the Jehovah's witnesses application for permit to use one of the city parks for a religious meeting. You heard that? A. I did. Q. Would your testimony be the same as theirs if you were questioned? A. It would Q. And your reason of course for the denial is the fact that it has been the policy of the City of Portsmouth to deny all religious organizations permits to use any of the public parks in the City, is that right? A. That's right. *Mr. Covington:* That's all.

RICHMAN S. MARGESON Sworn Mr. Margeson, called by defendants, being duly sworn, testified as follows: Q. (*By Mr. Covington*): Mayor Margeson, will you please state your full name and your address and your business occupation? A. Richman S. Margeson, 64 Vaughan Street, retail furniture. Q. And are you residing and do you have your business in the City of Portsmouth, New Hampshire? A. I do. Q. You have heard the testimony of the other gentlemen on the Council and in reference to the denial of the application made by Jehovah's witnesses for permission to use one of the

City parks of Portsmouth for a religious meeting. You heard that testimony, did you? A. I did. Q. Would your testimony be substantially the same if asked the same questions? A. Substantially the same, yes sir. Q. And the reason for the denial of the application so far as the City Council was concerned is because of the unwritten policy that exists in the City Council against allowing any religious organization to any use of any of the City parks for religious meetings, is that correct? A. That's correct. *Mr. Covington:* That's all. *Court:* If it was the policy, these meetings were restricted at all parks? *Witness:* All parks and all streets. *Court:* All right.

Cross Examination Q. (*By Mr. Reinhart*): For the purpose of the record, you are the Mayor of the City of Portsmouth? A. I am. Q. And you presided as Mayor as the presiding officer of the Council meeting held on the day this petition was presented? A. I did. Q. Whether or not it was you who extended the privilege to Mr. Derrickson to address the Council? A. I did. Q. And whether or not it was you who announced the policy of the Council regarding the policy of the City with respect to granting of permits to religious organizations? A. That is my recollection. Q. Was that announced before the vote was taken? A. I believe that was announced before the, Mr. Derrickson, or after Mr. Derrickson concluded his appeal to the Council. Q. As far as you know had any other petition ever been granted to any religious organization in the City of Portsmouth to conduct religious meetings in any public park? A. There have been none granted to my knowledge. Q. Have there been some asked for and denied? A. Yes there have. *Court:* What is the procedure at Council meetings in matters of this kind? *Witness:* In regard to procedure that is generally followed at Council meetings, normally the petitions are read by the Chair and then a motion is made by one of the Councilmen and is seconded before the discussion takes place. And in this it is my recollection or it is my belief that this motion was to the effect that the petition be denied and then thereupon it was seconded and thereafter there was a discussion and it was during the discussion period that Mr. Derrickson

had an oppoftunity to address the Council. *Mr. Covington:* That's all.

Q. (*By Mr. Reinhart*): Whether or not there was other business on the agenda for that meeting? A. There was other business on the agenda for that meeting. Q. In other words, this was not the only matter of business that came before the Council at that particular meeting?. A. That's right. Q. Could you give us some idea of the number of other items that appeared on that agenda, more than one or were there several?. A. Normally there are anywhere from twelve to fifteen petitions. *Mr. Reinhart:* I believe the agenda is in evidence, your Honor. *Court:* Yes. Already appeared in Defendants' Exhibit K.

Redirect Examination Q. (*By Mr. Covington*): Just a moment, Mayor, I have in my hand a true copy of the minutes of City Council meeting of May 4, 1950. "Present, Mayor Margeson, Councilmen Butler, Whitaker, Neal Simes, Leary, Patterson, Mullen. Absent, Councilman Noyes. Applications and petitions. A petition was read from Robert Wesley Derrickson, local group of Jehovah's witnesses, asking for the use of Goodwin Park for a series of public lectures on bible topics. Mr. Derrickson spoke briefly as did Councilmen Simes, Leary, Patterson, Mullen". And then it says, "Upon motion of Councilman Simes the petition was denied". Is this a correct statement of the way the thing occurred? A. Of course when I said our usual procedure, that is our usual procedure, but I have no knowledge that this written word is contrary to fact. Q. Mayor, don't you know that the ordinary, customary parliamentary practice is to have a discussion before there is a vote? A. Normally, however, we did, we followed the custom of having a motion and then seconded and then having discussion. *Court:* You had discussion after the motion and the motion was seconded, then you had the discussion, is that the way it was? That is what your usual procedure is? *Witness:* Well our usual procedure is to have a motion and have it seconded and then have a discussion period. Q. (*By Mr. Covington*): And then the voting comes? A. And then the voting comes after. Q. That is the way it

was here apparently? A. Yes. Q. No it's not. It shows the petiti read and then a discussion and then it says "Upon motion of Counci man Simes the petition was denied". So to that extent it may be in correct, is that it? A. I would not say the written record is incor rect but I would just say the normal procedure that we followed wa as I outlined. *Mr. Covington:* That's all, Mayor, thank you ver much sir.

Mr. Covington: At this time the respondents offer into evidenc Exhibit L, being an abstract of a deed to Goodwin Park conveyed t the City of Portsmouth in 1887. (Marked Defendants' Exhibit L)

Mr. Covington: Next we offer into evidence Exhibit number M which is an abstract of the deed to Langdon Park deeded to the Cit of Portsmouth in 1867. (Marked Defendants' Exhibit M)

Mr. Covington: Next we offer in evidence Defendants' Exhibi N, Respondent Exhibit N, being an abstract of the deed to Plain Memorial Park deeded to the City of Portsmouth in 1811. (Marke Defendants' Exhibit N)

Mr. Covington: We next offer into evidence Defendants' Ex hibit O, being an abstract of the deed to Prescott Park deeded to th City of Portsmouth in 1940. (Marked Defendants' Exhibit O)

Mr. Covington: We next offer into evidence Defendants' Ex hibit P, being an abstract of the deed to Haven Park deeded to th City of Portsmouth in 1899. (Marked Defendants' Exhibit P)

Mr. Covington: We next offer in evidence Exhibit Q being ab stract of deed to the Liberty Park the year 1924. (Marked Defend ants' Exhibit Q) We next offer in evidence an abstract of the dee to Hislop Park deeded to the City of Portsmouth in the year 1928 (Marked Defendants' Exhibit R) The next exhibit is S, being an ab stract of the deed from Carter to the City of Portsmouth coverin the children's playground park identified by one of the witnesses here tofore. (Marked Defendants' Exhibit S)

AMERICO J. BELLUCCI Mr. Bellucci, called by defendants, having been previously sworn, testified as follows: Q. (*By Mr. Covington*)

Will you please state whether or not you have examined your records to determine whether or not any permits have ever been granted to any organization to hold meetings? A. I have examined some of them, yes. Q. Of '48? A. 1948 and '49. Q. Now have you found any permits for any political meetings of any kind? A. As political meetings no I believe. Q. Any sort of meetings of any kind? A. I beg your pardon on that. If you want to call a parade for a rally for a man that was running for some office in the State there was a petition for that. Q. For a candidate for office to have a parade advertising his candidacy and meeting, is that right? A. Right. Q. Did you find any records of any application for permits to make use of any of the parks for religious meetings of any kind? A. Not for use of the parks. Q. For what? A. These copies of permits that were issued I believe to the Church of God and Christ to do social work. Q. Social work from door to door or in the streets? A. Well it isn't stated that specific. I will read it? Q. Yes. A. Be It Known that Alman A. Diggs of the Church of God and Christ having complied with all the requirements of the City Council of the City of Portsmouth is hereby licensed to held evangelistic services but not in public streets and permission to do social work in the City of Portsmouth until and including the 31st day of December 1949. Q. Any other? A. This reads the same way. You want me to read that? Q. Please. A. Be It Known that Alman A. Diggs of the Church of God and Christ having complied with all the requirements of the City Council of the City of Portsmouth is hereby licensed to hold evangelistic services but not on public streets and to do social work in the City of Portsmouth until and including the 31st day of December 1950. Q. Next. A. There is the third here and the last one which I found. This is the stub of the permit. Q. Same type of permit? A. Same type of permit and it expires, there has been an error here it says December 13th, 1951 but it should say December 31st, 1951. Q. All right. Now then, that particular, those particular licenses to do evangelistic work in the City of Portsmouth did not, were not issued for the holding of a meeting in any of the public parks, is that it? A. Probably not. Q. No. *Court:* Your records, your last record you mean 1950? *Mr. Covington:* Your Honor, as I understood it 1950;

including December 31st, 1951. *Court:* Oh, I understand. Q. (*By Mr. Covington*): So as far as your search of the records reveals it corroborates the testimony of the Councilmen in regard to this policy denying all religious organizations to make use of the parks, that is to say, you have found no record of any permit given to any religious organization to have religious meetings in any park of Portsmouth, is that correct? A. I would say yes. *Mr. Covington:* That's all.

Cross Examination Q. (*By Mr. Reinhart*): And that one petition there was also denied as far as the use of streets is concerned? A. Yes, It so stated.

Mr. Covington: That's all, may it please the Court and we have in evidence I believe all our exhibits, we have marked them, first which is A and the last exhibit is T, isn't it? S. With that the defendants or the respondents rest.

And for the purposes of this case we now move that both cases be consolidated and that they be treated as one case for the purpose of trial as well as for the purpose of decision and judgment so as to avoid the necessity of having two records in the event it becomes necessary.

Court: Well of course they have been tried together.
Mr. Covington: They have been tried together here in Court
Court: Do you care—
Mr. Covington: We make a motion.
Court: —care to submit briefs?
Mr. Covington: Your Honor, I would like to make my motion
Court: Go ahead.

Mr. Covington: I ask permission of the Court to file with the Clerk of this Court the following motion to dismiss which I will read into the record for the stenographer's benefit which we desire to have included in the stenographic report as well as the official record of the Court. The State of New Hampshire, Rockingham SS, October Term 1951, Superior Court. State vs Robert W. Derrickson, respondent. State vs William Poulos, respondent. May it please the Court, now come the above respondents and move the Court to find the

defendants not guilty, enter a judgment of acquittal and dismiss the prosecution for the following reasons: 1. The undisputed evidence shows that the members of the City Council and the City Council itself acted arbitrarily, capriciously and without support of law and of fact when they denied the application made by Jehovah's witnesses in behalf of the defendants to deliver the public talks upon the occasions in question. 2. The undisputed evidence shows that the park in question is a public park dedicated as such without any limitations in the deed of dedication or in the ordinances of the City of Portsmouth and the defendants had the legal right to deliver the talks in the park and it was the duty of the City Council to issue to the defendants permits to use the public park in question for public meetings and public talks. 3. If the ordinance is construed and applied so as to justify convictions of the defendants under the facts in this case then the ordinance is unconstitutional as construed and applied because it abridges the rights of the defendants to freedom of assembly, freedom of speech and freedom of worship contrary to the Bill of Rights of the New Hampshire Constitution and the first and fourteenth amendments to the Constitution of the United States. Wherefore, the defendants, that is, respondents pray for the above order. Signed by Henry M. Fuller and I will put my signature on it, Hayden C. Covington, attorneys for the defendants.

And that, your Honor, is the opinion which we all are familiar with that has been rendered by the Supreme Court of New Hampshire in this case and I shall not discuss it at length because it is unnecessary. I merely say that it was an opinion that was rendered on a tentative state of facts agreed to in view of the motion to dismiss that was filed in the Court raising the constitutional question or questions. The basis of the decision was that this ordinance had been construed in the same way that the State statute was interpreted by the Supreme Court of New Hampshire in the Cox case. Judge Allen of the Supreme Court in that case held that it was mandatory that the permit be issued upon the payment of the fee required and that there was no discretion vested to refuse it providing that the expense of policing the parade was paid for.

The Court in this case in answer to the certified questions held

that this ordinance was identical and that they would place the same interpretation upon it and the Court went outside of the stipulation of fact and referred to certain publications of the City of Portsmouth in reference to the use of its parks and from these publications, which we say in no way support the conclusion reached by the Court, the Court concludes and states as a fact that the City of Portsmouth had the right to and apparently did have a policy of excluding religious organizations from one of its particular group of parks which as we have heard the testimony in this case we find not to be true. That is an error on the part of the Supreme Court in so assuming and from the testimony that we heard here from the City Councilmen and from Mr. Derrickson who appeared before the City Council it appears that unlimited discretion was vested in the City Council and that instead of this case being within the rule of Cox vs. New Hampshire referred to by the Supreme Court of New Hampshire in the answer to the certified questions in this case the case is squarely within the rule of law laid down recently in the Supreme Court of the United States in the Niemotko vs Maryland case and also in earlier decisions referred to in that case. So instead of finding that this case is distinguished from the Maryland case and the cases there cited we find it in point with that case and that it is distinguishable from the construction placed upon the Cox case. The Cox case can be distinguished from the facts in this case in that there was no application for permit at all made in the Cox case for the holding of a parade. There was no opportunity for the exercise of discretion and the carrying out of mandatory requirements to issue the permit. And notwithstanding the fact that we have certified questions in this case that would apparently lead the Court to the conclusion that a judgment of guilty should be entered in this case, we find that there is every reason to conclude that a judgment of acquittal ought to be entered.

Now briefly that's our position. Do you have anything else? Now, your Honor, we are in a position to file briefs in this case if the Court so desires. I do not urge that the Court take briefs. On the other hand we would be quite happy to supply the Court with briefs if in view of the developments in the record made in this case the

Court is of the opinion that there are substantial questions involved that ought to be dug into more deeply.

Court: The evidence as it develops has developed somewhat differently than the statement of facts submitted.

Mr. Covington: That's right.

Court: I think I will require briefs.

Mr. Covington: Would you give us some time?

Court: I will give you one week and I will give the other side a week following.

Mr. Covington: We would be happy to do so. A week from today.

Court: Yes.

Mr. Covington: Thank you. May we submit the motion with the Clerk?

STIPULATION

It is hereby stipulated that subsequent to the judgment rendered in this case, the respondent Robert W. Derrickson has died.
Dated January 31, 1952.

ARTHUR J. REINHART
City Solicitor

HAYDEN C. COVINGTON
Attorney for Respondents

[fol. 60] IN SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

No. 4113

STATE *v.* WILLIAM POULOS *& a.*

Rockingham, April 26, 1952.

OPINION AS MODIFIED—June 3, 1952

Appeals, from the municipal court of Portsmouth. In that court on complaints the two defendants were found guilty of conducting on specified dates without being licensed open air public meetings in Goodwin Park, which abuts Islington Street in the city of Portsmouth. These are the same cases that were transferred by the Superior Court in advance of trial on an agreed stipulation of the facts, and that were reported in 97 N. H. 91. The controlling ordinance is found in chapter 24, article 7 of the ordinances of the city of Portsmouth. It is given in full in the report of the previous transfer.

The two complaints were tried jointly and *de novo* in the Superior Court following the opinion of this court, which opinion held that the ordinance was constitutional as therein stated. The right to jury was waived. It is conceded by the defense that many of the facts, including the lack of licenses, established by the testimony are substantially the same as those stipulated for use at the former transfer. The Court returned verdicts of guilty and filed findings and rulings as follows:

"These cases are appeals from the Portsmouth Municipal Court. The complaints charge the respondents with the violation of Chapter 24, Article 7, section 22, of the Municipal Ordinances of the City of Portsmouth, Section 22 reads as follows:

"'Sec. 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and [fol. 61] no open-air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the city council.'"

"The respondents admit violations of the ordinance but take the position that the refusal of the Portsmouth City Council to issue licenses to them to speak on religious topics in Goodwin Park, a public park in Portsmouth, was arbitrary and unreasonable and that their constitutional rights of freedom of assembly, freedom of speech and freedom of worship have been violated contrary to the Bill of Rights of the New Hampshire Constitution and the First and Fourteenth Amendments to the Constitution of the United States.

"The constitutionality of the statute, Revised Laws, Chapter 174, sections 2 and 4 by virtue of which the city ordinance was enacted, was settled in the Supreme Court of the United States in Cox vs New Hampshire, 312 U. S. 569, and cannot now be questioned in these proceedings.

"Counsel have tried these cases on the theory that the refusal of the City Council to grant licenses to the respondents was in issue. It is found as a fact that the action of the City Council in refusing to grant licenses to the respondents was arbitrary and unreasonable, but the Court rules as a matter of law that this issue is not properly before it in these proceedings.

"The respondents could have raised the question of their right to licenses to speak in Goodwin Park by proper civil proceedings in this Court, but they chose to deliberately violate the ordinance.

"Verdict of guilty against both respondents."

The Court imposed a fine of $20 on each defendant. [fol. 62] Exceptions were duly taken to the verdicts and the rulings of the court and a bill of exceptions was allowed both defendants by *Wescott, J.*

It is suggested that since the trial in the Superior Court the defendant Derrickson has died.

Gordon M. Tiffany, Attorney General, and *Arthur J. Reinhart*, city solicitor, for the State.

Hayden C. Covington (of New York) and *Henry M. Fuller* (*Mr. Covington* orally), for the defendants.

JOHNSTON, C. J. Since the defendant Derricksoa has died pending his appeal, the appeal on his behalf is abated. 24 C. J. S. 381, and cases cited; 96 A.L.R. 1317, 1322.

The Trial Court found that the city council in refusing to grant licenses to the defendants acted arbitrarily and unreasonably. The latter had offered to pay any reasonable fees customarily paid for the use of the park as well as any expenses incurred by the city in permitting the holding of the requested meetings. However, if the Court was correct that the remedy for such wrongful conduct was in appropriate civil proceedings and not in holding open air meetings in violation of the ordinance, the exceptions of the surviving defendant should be overruled. According to the Court, the defendants misconceived their remedy. It has been conceded by the defense on this transfer, as well as on the first one, that the ordinance is valid on its face. It is identical in language with the statute that was construed as valid in *State* v. *Cox*, 91 N. H. 137; which was affirmed in *Cox* v. *New Hampshire*, 312 U. S. 569. It is not disputed that the ordinance applies to the park that was the scene [fol. 63] of the open air meetings in question. No objection has been made to the application of the ordinance to the areas where the meetings took place, and no exception taken to any finding or ruling with respect thereto.

We see no reason for overruling the law as stated in this jurisdiction that a wrongful refusal to license is not a bar to a prosecution for acting without a license. "A wrongful refusal of a license is not equivalent to a license. Instead of prosecuting by proper proceedings his claim of right to a license, the defendant chose to disregard the law and must submit to the penalty." *State* v. *Stevens*, 78 N. H. 268, 270. It should be noted that the statutory provision for a penalty in case of a sale by an unlicensed person was held valid, even if a clause of another section with respect to a requirement of residence should be found invalid. This case clearly set forth the procedure to be followed in New Hampshire by one who has wrongfully been denied a license. What was there stated on page 270 applies to the present case. "The defendant had an ample remedy in the writ of certiorari."

The Yale Law Journal in an article on "Res Judicata," *v.* 49, *p.* 1266 asserts as follows: "The action of state licensing agencies has uniformly been held to be conclusive against collateral attack. . . . No distinction has been

made between errors of fact or of law in the mistaken refusal to grant the license. The same result has been reached even where the denial of a license was based on an unconstitutional section of a statute, provided that the entire statute was not thereby rendered invalid." The writer also cites *State* v. *Stevens, supra,* as authority. See also, *Phoenix Carpet Co.* v. *State,* 118 Ala. 143.

[fol. 64] The New Hampshire case of *State* v. *Stevens, supra,* has been cited as authority in the Massachusetts case of *Malden* v. *Flynn,* 318 Mass. 276. On pages 280 and 281 the court there stated: "The invalidity of the rule of the board of health, however, gives the defendant no right to transport garbage through the streets of Malden without a permit in violation of *s.* 31A. *Commonwealth* v. *Blackington,* 24 Pick. 352; *Commonwealth* v. *McCarthy,* 225 Mass. 192; *Commonwealth* v. *Gardner,* 241 Mass. 86; *State* v. *Orr,* 68 Conn. 101; *State* v. *Stevens,* 78 N. H. 268. The defendant was entitled to have his application for a permit considered fairly and impartially by the board and might have maintained a petition for mandamus if the board refused to consider it, ..."

The same principle of law is clearly stated in *Lipkin* v. *Duffy,* 118 N. J. L. 84, the headnote of which is as follows: "The provision of an ordinance that a license to carry on the business of conducting a junk yard should not be issued to a non-resident is unreasonable and discriminatory, but the remedy is by *mandamus* to compel consideration of the application for a license and not by the conduct of such business in violation of the valid portions of the ordinance without any license whatever."

While 33 Am. Jur. 395 in the article on "Licenses" takes the position that the cases are not unanimous, it uses *State* v. *Stevens, supra,* in support of the following: "According to other cases, however, when a license is refused by the licensing officer, although the applicant has done all that is necessary to entitle him thereto, he has no right to proceed to do the act for which the license is required." 53 C. J. S. 727, in its article on "Licenses" discusses the subject of defenses to criminal proceedings for violation of license [fol. 65] laws. The following is stated: "The fact that accused had applied for the requisite license; tendered the

fee, and had been refused a license constitutes no defense to a criminal prosecution for acting without a license unless the license authorities declined to issue a license on the ground that none was required; and it is likewise no defense to show that an application for a license would have been unavailing." As authority for the first proposition, *Commonwealth* v. *McCarthy*, 225 Mass. 192, which was referred to in *Malden* v. *Flynn*, *supra*, is used.

The defense relies heavily on the case of *Cantwell* v. *Connecticut*, 310 U. S. 296, for the proposition that the availability of the writ of *mandamus* under Connecticut law to review the action of the administrative officer in refusing a permit was not sufficient to preclude the court from considering the constitutional defenses. It must be noted, however, that in that case the entire licensing statute was held invalid as it was applied to persons engaged in distributing literature purporting to be religious and soliciting contributions to be used for the publication of such literature. The situation is different from that referred to in the Yale Law Journal, *supra*, and in *State* v. *Stevens*, *supra*, where the entire statute is not rendered invalid, so that convictions may be had under valid portions. Again we call attention to the fact that in this jurisdiction if a licensing statute is constitutional and applies to those seeking a license, the remedy here provided consists of proceedings against the licensing authority that has wrongfully denied the license. The substantial rights of the defendants to licenses are not here refused, but the manner in which they may be exercised must be defined in the licensing proceedings originating before the Council. Their remedy was against the City Council of Portsmouth but they chose not to follow it.

[fol. 66] Similarly, it was held in *Hague* v. *C. I. O.*, 307 U. S. 496, that municipal officers could be enjoined from action under certain ordinances that violated the constitutional rights of free speech and of assembly. Permits had been refused for public meetings, but, unlike the case at bar, the prosecutions were contemplated under ordinances that were invalid. "We think the court below was right in holding the ordinance quoted in note 1 [relating to public meetings] void upon its face." *p.* 516. Concerning the

ordinance dealing with the distribution of printed matter, the court said at page 518: "The ordinance absolutely prohibiting such distribution is void under our decision in *Lovell* v. *Griffin, supra,* and petitioners so concede."

In *Estep* v. *United States*, 327 U. S. 114, the court decided that in a proceeding for a violation of the Selective Training and Service Act of 1940 a defendant could show that the order of the local board exceeded the jurisdiction of the board since he had exhausted his administrative remedies. The board had wrongfully denied the defendant an exemption as a minister of religion. It was not necessary to comply with the order and then resort to *habeas corpus* to complete the civil remedies. *Gibson* v. *United States*, 329 U. S. 338, was similar in its facts and holding. In the case before us the defendant Poulos has not taken advantage of an available and proper remedy against the licensing authority. Moreover, he has been prosecuted under a valid ordinance which requires a license before open air public meetings may be held. The State's case was complete upon showing the conduct and the absence of the license. The valid ordinance then governed. It was not necessary for the State to show the rightful denial of the license. In the *Estep* and *Gibson* cases, it was essential for the government [fols. 67-68] to establish the orders of the local boards before it could convict for failure to comply with those orders. These two last mentioned cases are similar to the prosecutions for failure to comply with orders of quarantine issued by health officers cited in the brief for the defense. In such case the order and its validity, if questioned, must be established by the prosecution.

The remedy of the defendant Poulos for any arbitrary and unreasonable conduct of the city council was accordingly in *certiorari* or other appropriate civil proceedings. *American Motorists Ins. Co.* v. *Garage*, 86 N. H. 362, 368.

State v. Derrickson abated; exceptions of defendant Poulos overruled.

All concurred.

[fol. 69] IN SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

[Title omitted]

MOTION FOR REHEARING

May It Please the Court:

Now comes the defendant, William Poulos, within ten days from the date of notice of the decision rendered by this Court, and moves the Court for a rehearing in this case on the following grounds:

I

The Court has improperly construed and applied the doctrine of *State* v. *Stevens*, 78 N. H. 268, so as to deny to defendant his right to contend that the ordinance, as construed and applied, is unconstitutional under the federal Constitution, which construction is unreasonable and raises "a succession of constitutional doubts as to such interpretation". (*Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 422)

[fol. 70]

II

The construction of the ordinance so as to deny defendant the right to challenge the constitutionality of the ordinance, as enforced, construed and applied because it deprives him of freedom of assembly, speech and worship, is a conflict with the First and Fourteenth Amendments to the United States Constitution, which point is raised in the bill of exceptions.

III

The construction of the ordinance so as to deny defendant the right to challenge the constitutionality of the ordinance, as enforced, construed and applied, violates the substantive rights of the defendant and his procedural rights in criminal cases guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution, which ground was raised in the bill of exceptions.

IV

The interpretation placed upon the ordinance by this Court so as to deny the defendant the right to challenge the

validity of the administrative action in defense to the prosecution based thereon transforms the ordinance and the criminal proceedings of New Hampshire into a bill of attainder, contrary to clause 1 section 10 of Article I of the United States Constitution.

[fol. 71] Discussion

Point IV was not raised in the bill of exceptions and was not argued in this Court because it was assumed that this Court would distinguish *State* v. *Stevens*, 78 N.H. 268, from this case because of *Cantwell* v. *Connecticut*, 310 U. S. 296, on the grounds that here guaranteed civil liberties and constitutional rights are involved which the *Stevens* case, *supra*, was not concerned with. The fact that this Court has, for the first time, distinguished the *Cantwell* case, *supra*, it is respectfully submitted, justifies the consideration of this point for the first time in this case on this motion for rehearing.

In its opinion this Court inadvertently failed to say whether or not the requirement that the defendant pursue the civil remedies of mandamus or certiorari as a condition precedent to making any challenge against the validity of the administrative action constituted a violation of the First and Fourteenth Amendments to the United States Constitution. This point was raised in the bill of exceptions. It was supported by the law called to the attention of the Court on pages 24-28 of the brief for the respondents. The failure of the Court to discuss whether the construction of the ordinance so as to deny the defense constitutes a violation of the First and Fourteenth Amendments is an inad-[fol. 72] vertency on the part of the Court. This oversight is now called to the attention of the Court so that the issues involved can be discussed.

The distinction of *Cantwell* v. *Connecticut*, 310 U. S. 296, is not substantial. The statute in the *Cantwell* case was not declared to be void *on its face*. It was held to be valid on its face but unconstitutional as construed and applied by the administrative officer. This is the same contention that has been made in this case, but which has been evaded by the holding in this case.

The holding of this Court, denying the defendant the right to raise his constitutional objection in defense to the prose-

cution is in direct conflict with *Royall* v. *Virginia*, 116 U. S. 572, 582-584. In that case the licensing tax law was held to be constitutional on its face. As the basis for the denial of the license the administrative official relied on an unconstitutional statute. The same type of holding was made by the Virginia court in that case as was made by this Court in this case. In this case, like the *Royall* case, there is a valid law. In this case, like the *Royall* case, there is an arbitrary and capricious denial based on unconstitutional concepts of the law. In the *Royall* case there was a valid statute unconsti-
[fol. 73] tutionally construed and applied. In this case there is a valid ordinance unconstitutionally applied. The defendant in the *Royall* case was denied a constitutional right under a valid statute and penalized by having his constitutional defense taken away from him. In this case the Court has forfeited the federally guaranteed constitutional rights and denied the defendant the right to make his defense based on the federal Constitution in the same way that the Virginia court denied *Royall* his rights. In the *Royall* case the Court said:

"In the present case the plaintiff in error has been prevented from obtaining a license to practice his profession in violation of his rights under the Constitution of the United States. To punish him for practising it without a license thus withheld is equally a denial of his rights under the Constitution of the United States, and the law, under the authority of which this is attempted, must on that account and in his case be regarded as null and void." (116 U. S. at page 583)

The very fact that the Supreme Court of the United States has never held in civil rights cases, where the statute or ordinance was valid on its face but unconstitutional as applied by the administrative officials, that mandamus or certiorari must be resorted to as a condition precedent to judicial review should persuade this Court to reconsider *State* v. *Stevens*, 78 N. H. 268, and exclude its application
[fol. 74] to cases involving rights guaranteed under the federal Constitution. Compare *Schneider* v. *New Jersey*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Jones* v. *Opelika*, 319 U. S. 103; *Murdock* v. *Pennsylvania*, 319

U. S. 105; *Follett* v. *McCormick*, 321 U. S. 573; *Niemotko* v. *Maryland*, 340 U. S. 268.

This argument will not be confined to the discussion here. The argument of the defendant is augmented by the Memorandum of Argument Supporting Motion for Rehearing which will be filed in this case on or before May 6, 1952. Reference is here made to that memorandum and it is incorporated herein and made a part hereof as though copied at length herein. The Court is requested to defer final determination of this motion until such memorandum has been considered by the Court.

Wherefore the defendant respectfully prays that the Court, upon consideration of this motion, grant said motion, order a reargument of this case to determine whether or not the application of *State* v. *Stevens*, 78 N. H. 268, denies the defendant freedom of assembly, freedom of speech and freedom of worship, and his rights to due process of law in criminal proceedings, and whether the construction of the ordinance has transformed it into a bill of attainder, pains [fol. 75] and penalties contrary to Article I section 10 clause 1 of the Constitution of the United States, and sustain the exceptions of the defendant.

Respectfully submitted, Henry M. Fuller, 321 State Street, Portsmouth, New Hampshire; Hayden C. Covington, 124 Columbia Heights, Brooklyn 2, New York, Attorneys for Defendant.

[fol. 76] In Supreme Court of the State of New Hampshire

Docket Entries

In #4113 State v. William Poulos *& a.*

Rockingham: Entered February 14, 1952.

Plaintiff's ~~brief by March~~ 15, 1952; hearing April Session, 1952.

Defendants' brief filed February 12, 1952.

Plaintiff's brief filed March 28, 1952.

February 20, 1952. Motion by agreement of counsel to advance hearing to April Session granted.

April 26, 1952. Johnston, C. J. State v. Derrickson abated; exceptions of defendant Poulos overruled.

May 2, 1952. Motion for rehearing filed.
May 23, 1952. Motion for stay of execution filed.
June 3, 1952. Motion for rehearing denied; opinion modified. Goodnow, J. did not participate.
June 3, 1952. Execution of judgment stayed for ninety days; forwarding of certificate of the order of this Court to Clerk of Court below likewise stayed for the same period.
Aug. 14, 1952. Appeal to the United States Supreme Court filed. Bond approved.
A true copy:

Attest: George O. Shovan, Clerk of the New Hampshire Supreme Court.

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] In Supreme Court of the State of New Hampshire

[Title omitted]

Petition for Appeal Statement, Assignments of Error and Prayer for Reversal

Petition for Appeal

Considering himself aggrieved by the final decision by the Supreme Court of New Hampshire in the above entitled cause, the above named appellant hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order allowing same and fixing the amount of the bond thereon.

Statement

This case is one in which the validity of the state legislation is drawn in question, to wit, an ordinance of the City of Portsmouth, New Hampshire, Chapter 24, Article 7, which, among other things, reads as follows:

> Section 22. License Required: No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open air public meeting upon any ground abutting thereon shall be permitted unless a license

therefor shall first be obtained from the City Council. [fol. 79] Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open air public meeting.

Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such licensee shall perform or exhibit or such parade, procession or open air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.

Section 25. Penalty. Any person who violates section 22 of this Article shall be fined Twenty Dollars.

Said ordinance was in force and effect at the time of the facts alleged in the petition for appeal appearing above. It is drawn in question upon the ground that it is repugnant, as enforced by the State, to the First and Fourteenth Amendments to the United States Constitution.

Therefore in accordance with the rules of the Supreme Court of the United States (Rule 46, paragraph 2) and 28 U. S. C. Sec. 1257 (2) and Section 237 (a) of the Judicial Code, the appellant respectfully shows this Court that this case is one in which, under the legislation in force when the Act of January 31, 1928 (45 State. L. 54) was passed, to wit, under Section 237 (a) of the Judicial Code (28 U. S. C. Sec. 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

Assignments of Error

Now comes the appellant in the above cause and files herewith, together with his petition for appeal, these assignments of error and says that they are errors committed by the Supreme Court of New Hampshire in the record and [fol. 80] proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States says that the Supreme Court of New Hampshire erred in the judgment affirming the conviction entered against appellant because—

1. The ordinance, as construed and applied in this case, is invalid because it abridges appellant's rights of freedom of conscience, freedom of speech, freedom of assembly and

freedom of worship, contrary to the First and Fourteenth Amendments to the Constitution of the United States.

2. The law of New Hampshire, authorizing the denial of the defense of unconstitutionality of the ordinance because appellant failed to mandamus the licensing officer is unreasonable, arbitrary, a bill of pains and penalties, discriminatory and a capricious exercise of the police power abridging the constitutional rights of appellant contrary to Article I, Section 10 of the Constitution of the United States, and the First and Fourteenth Amendments to the Constitution of the United States.

3. The ordinance and the law denying a defense, as enforced, construed and applied, deprive the appellant of freedom to enjoy and exercise his freedoms of assembly, speech, worship, and conscience, contrary to the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Prayer for Reversal

For and on account of the above errors, the above-named appellant prays that the said judgment of the Supreme Court of New Hampshire, hereinabove described in the above entitled cause be reviewed by the Supreme Court of the United States and reversed, and a judgment rendered in favor of appellant, and for his costs.

Hayden C. Covington, 124 Columbia Heights, Brooklyn 2, New York, Counsel for Appellant.

[fol. 81] In Supreme Court of the State of New Hampshire

[Title omitted]

Order Allowing Appeal—August 12, 1952

The appellant in the above entitled cause having prayed for the allowance of an appeal from the judgment of the Supreme Court of New Hampshire on April 26, 1952, which became final on June 3, 1952, when the motion for rehearing was overruled; and having presented and filed his petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the applicable rules and statutes,

It is ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States as provided by law, and

It is further ordered that the Clerk of the Supreme Court of New Hampshire shall prepare and certify a transcript of the record herein containing a true copy of all of the material parts which shall be designated by praecipe filed with him by any of the parties hereto, and transmit the same to the Supreme Court of the United States so that the [fol. 82] transcript shall reach said Court on or before forty days of this date, and

It is further ordered that execution and enforcement of the judgment and decree entered by the Superior Court and the decree entered by the Supreme Court of New Hampshire, affirming the judgment of the Superior Court dated April 26, 1952, rehearing denied June 3, 1952, in this case be, and the same is hereby stayed pending a final disposition of this appeal in the Supreme Court of the United States; and

It is further ordered that the appellant shall execute a good and sufficient security bond in the sum of Five Hundred Dollars ($500.00), said bond to be subject to the approval of the Clerk of the Supreme Court of New Hampshire.

Frank R. Kenison, Chief Justice of the Supreme Court of New Hampshire.

Dated this 12th day of August, 1952.

[fol. 83] Citation in usual form showing service on Gordon M. Tiffany omitted in printing.

[fol. 84] Cost Bond on Appeal for $500.00 approved. Omitted in printing.

[fols. 85-86] Notice Calling Appellee's Attention to Rule 12 (omitted in printing).

[fols. 87-88] Acknowledgment of Service (omitted in printing).

[fol. 89] IN SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF THE RECORD

To the Clerk of the Supreme Court of New Hampshire:

Please incorporate the following documents into the transcript of the record on appeal to the Supreme Court of the United States, which appeal has been heretofore prayed for and allowed from the final judgment of the Court in the above entitled action, to wit:

1. Printed Bill of Exceptions filed in this cause.
2. Corrected opinion of the Supreme Court of New Hampshire in this case and the former opinion in the reserved case, No. 4042 in this Court.
3. Final judgment of affirmance by this Court.
4. Motion for rehearing.
5. Order denying the motion for rehearing.
6. Petition for appeal, statement, assignments of error and prayer for reversal.

[fol. 90] 7. All of the docket entries of the Supreme Court of New Hampshire made in this cause from the date of filing the case to the date of the preparing of the transcript here requested.

8. Statement as to jurisdiction.
9. Bond for costs, etc., on appeal to the Supreme Court of the United States.
10. Citation.
11. Order allowing appeal to the Supreme Court of the United States.
12. Statement of points to be relied on.
13. Acknowledgment of service by counsel for appellee.
14. This praecipe and proof of service thereof.

Dated at Brooklyn, New York, this — day of August 1952.

Hayden C. Covington, 124 Columbia Heights, Brooklyn 2, New York, Counsel for Appellant.

[fol. 91] [File endorsement omitted]

IN SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

[Title omitted]

STATEMENT OF POINTS RELIED ON—Filed September 17, 1952

Comes now the above named appellant in the above entitled cause and states that the points upon which he intends to rely in the Supreme Court of the United States in this cause are as follows:

1. The ordinance, as construed and applied in this case, is invalid because it abridges appellant's rights of freedom of conscience, freedom of speech, freedom of assembly, and freedom of worship, contrary to the First and Fourteenth Amendments to the Constitution of the United States.

2. The law of New Hampshire, authorizing the denial of the defense of the unconstitutionality of the ordinance because appellant failed to mandamus the licensing officer, is unreasonable, arbitrary, a bill of pains and penalties, discriminatory and a capricious exercise of the police power abridging the constitutional rights of appellant, contrary to Article I, Section 10 of the Constitution of the United States, [fols. 92-94] and the First and Fourteenth Amendments to the Constitution of the United States.

3. The ordinance and the law denying a defense, as enforced, construed and applied, deprive the appellant of freedom to enjoy and exercise his freedoms of assembly, speech, worship, and conscience, contrary to the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

For the above reasons the judgment of the Supreme Court of New Hampshire should be reversed.

Hayden C. Covington, 124 Columbia Heights, Brooklyn 2, New York, Counsel for Appellant.

[fol. 95] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 341

[Title omitted]

DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—
Filed November 22, 1952

To the Clerk of the Court:

Now comes the appellant, pursuant to the requirements of paragraph 9 of Rule 13 of the Rules of this Court and designates the parts of the record which he thinks necessary for printing in the consideration of the case:

1. Final judgment of New Hampshire Supreme Court rendered on June 3, 1952.
2. Motion for rehearing.
3. Order denying motion for rehearing.
4. Petition for appeal, statement, assignments of error and prayer for reversal.
5. All docket entries of the New Hampshire Supreme Court.
6. Order allowing appeal.
7. Statement of points to be relied upon.
8. Order of this Court postponing further consideration of jurisdiction, November 10, 1952.
9. This designation of parts of record to be printed.

Dated at Brooklyn, New York, this 21st day of November, 1952.

Hayden C. Covington, Counsel for Appellant.

[fols. 96-98] Proof of Service (omitted in printing).

[fol. 99] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 341

[Title omitted]

ORDER POSTPONING JURISDICTION—November 10, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits and the case is transferred to the summary docket.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

STATEMENT AS TO JURISDICTION

HAYDEN C. COVINGTON,
Counsel for Appellant.

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No. 4113

STATE

v.

WILLIAM POULOS

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

Appellant files his statement discussing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question pursuant to Rule 12 (1) of the Rules of the Supreme Court of the United States, as amended April 6, 1942.

Opinion Below

The court below wrote an opinion which is reported at 88 Atl. 2d 860. The opinion of the Supreme Court of New Hampshire is made a part hereof, as Appendix A. An earlier opinion answering certified questions in this case appears at 97 N. H. 91, 81 Atl. 2d 312. It is Appendix B.

I

Questions Presented

Is the construction of the laws of New Hampshire and the ordinance in question—so as to completely deny the appellant the right to challenge the federal constitutionality of the ordinance, as enforced, construed and applied in criminal proceedings brought to punish appellant for holding a meeting and giving a speech in the city park of Portsmouth without a permit, which was applied for and illegally denied according to the holdings of the courts below—an abridgment of the rights of appellant to freedom of speech and assembly contrary to the First and Fourteenth Amendments to the Constitution of the United States?

II

Does the punishment of appellant for holding a meeting and speaking in the park without a permit that had been arbitrarily and capriciously denied by the City Council of Portsmouth in violation of the Federal Constitution amount to a construction of the ordinance which is an illegal burden and abridgment of the appellant's rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States?

III

Is the denial of the right to make a defense to the prosecution, charging a violation of the ordinance by failure to have a permit, a violation of the rights to procedural due process of law and a bill of pains and penalties in violation of Article I, Section 10 of, and the Fourteenth Amendment to, the Constitution of the United States?

The first two questions were raised by motion to dismiss in the Superior Court of New Hampshire [3-4] [1]. These

[1] Numbers appearing herein in brackets refer to pages of the printed bill of exceptions filed in the Supreme Court of New Hampshire.

questions were adversely determined by the Supreme Court of New Hampshire. The entire opinion of the Supreme Court of New Hampshire is a part of this statement of jurisdiction. See Appendix A and Appendix B at the end of this statement. By motion for rehearing the third question was raised. The motion was denied.

Statutes Involved

This case draws into question the validity of an ordinance of the City of Portsmouth, New Hampshire, Chapter 24, Article 7, which, among other things, reads as follows:

> Section 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open air public meeting upon any ground abutting thereon shall be permitted unless a license therefore shall first be obtained from the City Council.
>
> Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open air public meeting.
>
> Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such licensee shall perform or exhibit or such parade, procession, or open air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.
>
> Section 25. Penalty. Any person who violates section 22 of this Article shall be fined Twenty Dollars'' [1].

Constitutional Provisions Involved

Section 10 of Article I of the Constitution of the United States, relied upon in this case, reads as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and Silver Coin a Tender in Payment of Debts;

pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The First Amendment, relied upon in this case, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent parts of the Fourteenth Amendment which appellant relies upon read as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Matters Related to Jurisdiction

Timeliness

The judgment of the Supreme Court of New Hampshire affirming the judgment of the Superior Court was entered April 26, 1952. See Appendix A containing the opinion of the Supreme Court of New Hampshire. A motion for rehearing was filed. It was denied June 3, 1952. The judgment affirming the judgment of the trial court, therefore, became final on June 3, 1952. This appeal is duly presented and filed within the 90-day time limit after the judgment became final. The appeal is timely.

Nature of Case

This is a criminal case. It is an appeal from a judgment affirming a judgment of conviction on an appeal trial

de novo in the Superior Court. The appellant was proceeded against in the Municipal Court of Portsmouth by complaint. He was charged with violating the ordinance in question on July 2, 1950. A companion complaint was made against Derrickson, now deceased. The pertinent part of the complaint charged that Poulos did "on a certain ground abutting a public street, to wit, Islington Street and upon certain ground abutting thereto known as Goodwin Park, did conduct an open air public meeting without having first obtained a license from the City Council so to do" [1-2, 6-7].

How Constitutional Questions Raised

The first two constitutional questions were raised in a motion to dismiss filed in the Superior Court of New Hampshire [3-4, 8-9]. Each question presented in that court was considered and overruled in a written opinion [4-5]. Each holding of the trial court was presented on appeal to the Supreme Court of New Hampshire and duly assigned as error [1-6]. Each federal question presented upon this appeal also was presented to the Supreme Court of New Hampshire in the brief, on oral argument and on the motion for rehearing. See Appendix A and Appendix B of this statement as to jurisdiction.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code or 28 U. S. C. 1257(2).

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Statement of Case

The Proceedings

The appellant pleaded not guilty in the Municipal Court. He was found guilty and fined. He appealed to the Superior Court. On the first hearing before the Superior Court of New Hampshire the case was reserved and at an earlier term transferred to the Supreme Court of New Hampshire. The parties there stipulated the facts. The Supreme Court of New Hampshire held that the ordinance was constitutional because the park was limited in its dedication and permissive use by the City of Portsmouth. See 97 N. H. 91, 81 A. 2d 312.

The case was tried in the Superior Court following the opinion of the Supreme Court of New Hampshire. The appellant pleaded not guilty [3]. A jury trial was waived and the case was tried to the judge alone. At the close of the evidence a motion for judgment of acquittal was made [3-4]. The case was taken under advisement and on December 6, 1951, the court rendered a judgment convicting appellant [4]. A brief memorandum opinion stating the reasons was filed by the court. The judge found that the application for the permit had been arbitrarily and capriciously refused. But he convicted on the ground that it was the duty of appellant to resort to a civil action for mandamus and not defy the law and throw the controversy into the criminal courts. He held that by defiance of the law the appellant forfeited his right to make his defense of unconstitutionality of the enforcement of the law [4-5]. He convicted and fined appellant $20.00 [5].

The Facts

The appellant is a duly ordained minister of the gospel serving the congregation of Jehovah's Witnesses located in the city of Portsmouth, New Hampshire [14, 27]. The con-

gregation is a duly recognized group of Christian people [14-15]. The congregation is essentially evangelistic, composed primarily of missionaries engaged in door-to-door and street distribution of Bibles and Bible literature [14].

In the spring of the year 1950 the congregation, acting through Derrickson, now deceased, and Poulos, made application to the city council of the City of Portsmouth for a license to hold a public meeting in Goodwin Park [27-28]. A written petition was duly addressed to the city council of Portsmouth and filed with the clerk [28]. The appellant and Derrickson were informed that they could appear and speak in behalf of the petition before the city council [28]. The petition was placed on the agenda for hearing May 4, 1950 [28]. On that date Derrickson and Poulos appeared before the city council, Derrickson doing the speaking in behalf of the congregation of Jehovah's Witnesses. The congregation offered to pay any reasonable fee customarily paid for the use of the park as well as any expenses incurred by the city in permitting the holding of the requested meeting. The city council was informed the names of the Bible talks to be delivered and the date, time and place of the proposed assemblies in the park in question. Derrickson showed that the talks related to an explanation of Bible prophecy, showing the cause of the suffering of mankind, the reason for the failure of the governments of this world to bring about a desired peace and the remedy for all the sufferings of mankind, as well as the failure of the governments to bring relief. It was pointed out to the city council that the speeches were designed to prove that Almighty God Jehovah will set up a government of righteousness over the earth that will stand forever and bring peace, prosperity, happiness and everlasting life to men of good will toward him [29, 31-32].

The city council was informed that the assemblies as well

as the speeches proposed to be delivered in the park were to be free of charge and that the public would be freely invited and none excluded [33]. That the series of proposed lectures to the proposed assemblies in the park would show that the people are now living in the "last days" referred to in the Bible and that the great cataclysm of Armageddon is rapidly approaching, from which all honest people desire to find a way of safety and protection [29-32]. It was pointed out that the meetings came within the guarantee of freedom of assembly, freedom of speech and freedom of worship [29-32]. Derrickson read to the city council excerpts from decisions of the Supreme Court of the United States [30].

The petition was denied because the members of the council stated that they had never received a petition of a religious group to use the public parks [31].

Thereafter Jehovah's Witnesses planned to hold their requested series of public meetings in Goodwin Park notwithstanding the refusal of the city council to grant the petition for a license [15, 31]. They selected a spot in the park for assembling and the proposed talk was advertised [15, 31].

On Sunday, June 25, 1950 at three o'clock in the afternoon, Derrickson made his appearance at the park together with a large number of other persons assembled therein to listen to him speak. He had as his title for his public speech "The Pathway to Peace." After being introduced by the chairman he began his talk, which was orderly, without a disturbance. He spoke for about forty-five minutes [31-33].

At 3:45 the speaker was stopped by a police officer of the city of Portsmouth and asked if he had a permit to hold such an open air meeting in the park [32]. Derrickson replied that he had petitioned for a permit but was denied one [32]. Thereupon the policeman left and Derrickson

continued his talk [32]. Shortly thereafter the policeman returned before Derrickson completed his talk and commanded him to discontinue the speech and to disband the congregation, otherwise he would arrest Derrickson. Derrickson refused to do so and continued to speak to the congregation [32]. Then other policemen arrived and took Derrickson to the police station where the warrant and complaint was read to him charging him in the manner above stated [32].

Jehovah's Witnesses planned to hold the second talk of the series of public meetings on Sunday, July 2, 1950. On this date Poulos was selected as the speaker [15]. At three o'clock on that afternoon Poulos made his appearance at the park together with a large number of other persons assembled therein to listen to him speak [15]. He had as title for his public speech "Preserving Godliness Amid World Delinquency". After being introduced he began his talk, which was orderly and without a disturbance [15-16]. He spoke for about fifteen minues [15-19].

At 3:15 Poulos was stopped by a police officer who asked him if he had a permit to hold an open-air meeting in the park and to give the talk [16-18]. Poulos answered that he did not have a permit because the city council had denied the petition for a license and then added that he did not have a permit because it was not necessary [16-18]. The officer informed him that he would have to stop speaking [18]. Poulos informed the officer that he intended to continue [18]. The officer told him that he would be arrested. Poulos continued [18]. He was arrested and transported by automobile to the police headquarters where he was charged by warrant and complaint in the manner above recited [18-19].

The testimony of the councilmen of Portsmouth was uniformly that the city did not have any ordinances or regula-

tions whereby any one park was selected for the purpose of holding religious meetings. They all agreed that there was no type of zoning or selection of the parks for recreation purposes. They all testified that the policy was to deny all applications for permits for religious use on the ground that if they granted a permit for one they would have to give one to all religious organizations. It was admitted that they claimed discretion under the ordinance to refuse religious organizations the use of the parks [20-46].

This testimony of the officials directly contradicted the finding of the Supreme Court of New Hampshire on the reserved case answering the certified questions in advance of the trial in the Superior Court of New Hampshire. 97 N. H. 9, 81 A. 2d 312. There in that opinion the court went out of the record and found a fact that was not in the record and one that did not exist according to the testimony of the councilmen and the clerk of council of the City of Portsmouth.

The Supreme Court of New Hampshire in *State* v. *Derrickson*, in 97 N. H. 91, 81 A. 2d 312, found that the City of Portsmouth had selected Goodwin Park, confined it to recreation and prohibited in it religious assemblies while allowing such assemblies in other parks. This finding was without basis in fact and was made from some mysterious source other than the record. The testimony in the case not only fails to support the finding but it contradicts such finding. The record shows that no park in Portsmouth is set aside and dedicated exclusively for the use of religious assemblies. There are no ordinances or other regulations of the city whereby an effort is made to zone the parks for different types of uses.

The evidence in the case shows that since the inception of the ordinance it has always been the policy to enforce the ordinance so as to deny licenses to all religious organizations. This enforcement of the ordinance presented to the

trial court the identical question that was presented to the Supreme Court of New Hampshire when the reserved case was presented but which was sidestepped by the Supreme Court of New Hampshire through the medium resorted to in its opinion of June 5, 1951. The question presented, stated by the court in its opinion of that date, will be repeated: "Whether a city could prohibit religious meetings in all of its parks is a doubtful question which we need not decide in this case."

The Superior Court, by holding the denial of the application for a permit was arbitrary and capricious, sustained the contention of appellant that the enforcement of the ordinance violated appellant's rights guaranteed by the First Amendment. That court, however, forfeited appellant's defense because he did not apply for a writ of mandamus [4-5]. The Supreme Court of New Hampshire affirmed the holding on authority of *State* v. *Stevens*, 78 N. H. 268. See *State* v. *Poulos*, 88 A. 2d 860. See also Appendix A.

The Questions Are Substantial

The basic question to be determined upon this appeal is whether the defense that an ordinance or statute abridges freedom of assembly and speech contrary to the First Amendment (as enforced, construed and applied by the administrative officials of a town, city or state) can be urged in defense to the prosecution charging appellant with the failure to possess a permit which had been arbitrarily refused to him by the officials. Or, is such defense of unconstitutionality in criminal proceedings charging a failure to have a permit confined to the invalidity of the ordinance on its face?

It was held by the Superior Court that the refusal to grant the requested permit was arbitrary and capricious. On the appeal the Supreme Court of New Hampshire sustained this position. This holding by both courts was tanta-

mount to a holding that the enforcement, construction and application of the ordinance by the officials at Portsmouth was a deprivation of freedoms of speech and assembly contrary to the First and Fourteenth Amendments to the United States Constitution. The courts, however, held that the defense was not available in the criminal proceedings. They held that it was permissible only by way of mandamus proceedings to compel the issuance of the permit.

The decisions of the courts below were a departure from the holding of the Supreme Court of New Hampshire in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508, affirmed *Cox* v. *New Hampshire*, 312 U. S. 569. In the *Cox* case, the court in criminal proceedings considered and passed upon the defense whether the enforcement of the state statute, identical to the ordinance in this case, abridged freedoms guaranteed to the appellant by the First Amendment, in that case. That court and the Supreme Court of the United States did not deny the defense but passed upon it. This time the New Hampshire courts depart from the procedure in the *Cox* case and follow the old case of *State* v. *Stevens*, 78 N. H. 268.

The doctrine of the *Stevens* case, while doubtfully permissible in prosecutions for failure to have an administrative permit to perform acts or work not guaranteed by the First Amendment, clearly cannot be enforced to deny the defense where the activity of the appellant, as here, is guaranteed by the First Amendment.

This Court has held that considerations of the sort that would justify an abridgment or denial of a right to carry on other activity are not sufficient to justify the abridgment of liberties secured by the First Amendment. See *Schneider* v. *New Jersey*, 308 U. S. 147, at page 161; *Thornhill* v. *Alabama*, 310 U. S. 88, at pages 95-96.

Cantwell v. *Connecticut*, 310 U. S. 296, controls here. There the Court held that the availability of the writ of mandamus to the Cantwells under Connecticut procedure to

compel the issuance of the permit did not preclude this Court from determining whether the ordinance, as construed and applied, abridged the rights of the appellants in that case. See 310 U. S. at pages 305-307. It is submitted that the decisions below conflict with the *Cantwell* holding by this Court.

The court below attempted to evade the obligations imposed by the Cantwell holding. The court said: "It must be noted, however, that in that case the entire licensing statute was held invalid as it was applied to persons engaged in distributing literature purporting to be religious and soliciting contributions to be used for the publication of such literature. The situation is different from that . . . where the entire statute is not rendered invalid, so that convictions may be had under valid portions."

The court below misapprehended the effect of the holding of this Court in the *Cantwell* case. While the Court said that the statute in *Cantwell* was *invalid as applied* it discloses the belief that certain parts of the statute was held void on its face. This Court held no part of the statute void on its face; the holding of this Court was merely that, as construed and applied to the facts of the case, it was unconstitutional under the First Amendment.

Appellant here made the identical contention that was made in the *Cantwell* case. It is that the ordinance, as construed and applied by the administrative officials at Portsmouth, is an abridgment of liberties guaranteed by the First Amendment. The courts below admit the correctness of this contention, but hurl back upon the appellant their incompetency to determine the question in these proceedings. It is submitted that the present case is not distinguishable from the *Cantwell* case.

The holding of the court below, denying appellant the right to raise his constitutional objections in defense to the prosecution is in direct conflict with *Royall* v. *Virginia*, 116

U. S. 572, 582-584. In that case the licensing tax law was held to be constitutional on its face. As the basis for the denial of the license the administrative official relied on an unconstitutional statute. The same type of holding was made by the Virginia court in that case as was made by the court below in this case. In this case, like the *Royall* case there is a valid law. In this case, like the *Royall* case, there is an arbitrary and capricious denial based on unconstitutional concepts of the law. In the *Royall* case there was a valid statute unconstitutionally construed and applied. In this case there is a valid ordinance unconstitutionally applied. The defendant in the *Royall* case was denied a constitutional right under a valid statute and penalized by having his constitutional defense taken away from him. In this case the court below has forfeited the federally guaranteed constitutional rights and denied appellant the right to make his defense based on the Federal Constitution in the same way that the Virginia court denied Royall his rights. In the *Royall* case the Court said:

> In the present case the plaintiff in error has been prevented from obtaining a license to practice his profession in violation of his rights under the Constitution of the United States. To punish him for practicing it without a license thus withheld is equally a denial of his rights under the Constitution of the United States and the law, under the authority of which this is attempted, must on that account and in his case be regarded as null and void (116 U. S. at page 583).

While there is no law of New Hampshire or of Portsmouth which commanded the unconstitutional denial of the permit in this case there was an unwritten policy of the city council that required it. An invalid unwritten policy relied upon by a city council is as much within the reach of the Constitution as is a written law to the same effect. *Niemotko* v. *Maryland*, 340 U. S. 268, at page

271-272. The unwritten unconstitutional policy in th case gives no stronger support to the decision of the cou below than does the written law in the case of *Royall Virginia*, 116 U. S. 572, at page 583. It is submitted th there is a direct conflict between the decision of the cou below and the holding of this Court in the *Royall* case.

The tergiversation of the New Hampshire Supren Court in this case alone ought to be sufficient grounds f the taking of jurisdiction in this case and reversing t judgment of conviction. On the same set of facts disclos in the record in this case, except for the testimony of t councilmen denying the statements made by the Supren Court of New Hampshire in its first opinion, the cou sustained the validity of the law. It considered the d fense of unconstitutionality raised by the appellant the answer to the certified question. See *State* v. *De rickson*, 97 N. H. 91, 81 A. 2d 312. When it was confronte with the inescapable duty of passing on the constitutionali of the administrative action by the Portsmouth city counc on the appeal in this case, it chose to elude the duty i posed on it by the First and Fourteenth Amendments b resurrecting and wrongly applying the doctrine of *Sta* v. *Stevens*, 78 N. H. 268, at page 270. This hedgehoppi of sacred constitutional rights of the people of the Unite States by the Supreme Court of New Hampshire produc a tremendously large area of uncertainty in the field c constitutional law which ought to be extirpated by th Court.

This Court has held that whether a law is valid or i valid under the Constitution "depends on how the statu is construed and applied. It may be valid when given particular application and invalid when given another. (*Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535, at pag 545.) The New Hampshire Supreme Court has, to the co trary, erroneously concluded that this Court has limite

the collateral attack against administrative determinations in civil liberties cases to situations where the ordinance providing for the administrative action is void on its face. See the court's discussion in the opinion about the holding in *Hague* v. *C. I. O.*, 307 U. S. 496. See Appendix A, *infra*.

The holding of the court below is that if the laws are constitutional as written by the legislature but are unconstitutional as enforced, construed and applied by the administrative agency, such attack is made collaterally and is one that cannot be considered except in certiorari proceedings brought directly to review.

This position is patently wrong as far as the federally secured liberties of assembly, speech and worship are concerned. This Court has never made a distinction between the unconstitutionality of a statute written by the legislature of a state invalidly upon its face and because of invalidity as enforced, construed and applied by the administrative departments of the state government. In fact, this Court has repeatedly considered collateral attacks against administrative determinations that constitute unconstitutional enforcement, construction and application of legislative enactments.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held that the ordinance providing for the issuance of the permit was perfectly valid as written. The attack was collateral and identical to that made in this case against the ordinance. It was asserted that the ordinance was invalid as enforced, construed and applied by the administrative officers. This Court considered the contention made collaterally against the administrative determination in habeas corpus proceedings brought to review the conviction in a criminal case. This Court has repeatedly considered and held invalid under the Federal Constitution perfectly valid laws as written. The application of the laws was held to be arbitrary, capricious and unconstitutional. The enforce-

ment of them was held to be invalid. See *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 506-508; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 20; *Louisville & Nashville R. Co.* v. *Greene*, 244 U. S. 522, 527, 528, 530, 531; *Sterling* v. *Constantin*, 287 U. S. 378, 393; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434.

The unsoundness of the decision of the court below in this case can be easily demonstrated. That court has limited the attack on constitutional and federal grounds against a law in a criminal case to whether or not the law is invalid as written. The court has emasculated the criminal courts of the state by saying that they do not have as much power as the civil courts. The holding of the court below is such as to put a person confronted with an administrative order in a quandary and predicament.

The decision forces piecemeal litigation. If a person contends that an ordinance is void on its face his remedy is to refuse to comply with it and defend in a prosecution. If the ordinance is said to be invalid as enforced, construed and applied, the only remedy is mandamus or certiorari. Now, is not this an anomalous situation? Does not this make a farce out of litigation? Does it not produce a multiplicity of suits? Does it not split causes of action and grounds of defense? Does it not put a judicial burden and impediment upon the people of the state seeking to exercise their civil liberties?

What could a lawyer do for a client who contends that a law is both unconstitutional on its face and as construed and applied? He, in fairness, ought to be able to make both contentions in one proceeding. The court below, however, has artificially inseminated the law and produced an innovation that forces the lawyer to divide his litigation like an amoeba. Litigation is like the atom; it is dangerous to split. The Supreme Court of New Hampshire has, alas, performed a miracle. It is submitted that this is not the

function of temporal powers, judicial though they may be.

The court below, in attempting to elude *Estep* v. *United States*, 327 U. S. 114, and *Gibson* v. *United States*, 329 U. S. 338, has skated onto thin ice. In simulating a distinction of this case from those two cases, the court below states two grounds. First it says that "Poulos has not exhausted his administrative remedies because of his failure to resort to civil proceedings against the city council"; then it declares that "it was essential for the government to show valid orders of the local boards before it could convict for failure to comply with those orders." This statement follows the observation that it "was not necessary for the State to show the rightful denial of the license." (See the opinion, Appendix A.)

What is the *administrative* remedy that was available to Poulos? Is there a remedy provided in the ordinance? A search shows none. Is there a statutory remedy for review of contentions that a denial of a permit constitutes an unconstitutional enforcement, construction and application of an ordinance? There is no such statutory administrative remedy on the statute books of New Hampshire.

It is indeed a new theory to say that a judicial remedy is an administrative remedy. It has been universally held by the courts, state and federal, that administrative remedies do not include judicial remedies. The remedies of mandamus and certiorari have been held to be judicial remedies and not administrative remedies. The courts have all (except one) held that it was not necessary to resort to one particular judicial remedy to review an administrative determination, unconstitutionally construing and applying a law, before being entitled to make a defense in a criminal proceeding or a collateral attack in an injunction proceeding. See *Lane* v. *Wilson*, 307 U. S. 268; *Railroad & W. Comm'n of Minnesota* v. *Duluth St. Ry.*, 273 U. S. 625. The court below in its opinion stands alone

and ignores the principle of those decisions. This oversight alone is sufficient ground for noting jurisdiction.

The statement that the Government in draft prosecutions is required affirmatively to prove the validity of the order is not true according to federal criminal procedure. The court below says that the Government in draft prosecutions must negative the invalidity of the draft board order. This has never been the holding of any of the federal courts. The court below says that all that need be done in a case where a person holds a meeting after there has been a denial of the permit is to show merely that there has been a denial and the holding of the meeting. In federal draft prosecutions the burden is no greater. All the Government has to do in those prosecutions is to show the registration, the classification, the acceptance, the order to report for induction and the refusal to comply therewith, and case is made out. It is incumbent upon the defendant to point out the invalidity of the order in defense. The appellant sought to do this in the court below. The court, for reasons held invalid in the *Estep* and *Gibson* cases, *supra*, refused to consider the defense that the ordinance was unconstitutional. How it distinguishes the *Estep* and *Gibson* decisions according to the true judicial process does not appear. No distinction can be made. The holdings in those cases control here.

The principle laid down by the court below burdening the exercise of the right to hold a meeting and give a speech in a park with the weighty expense and tiresome wait for a final decision in a mandamus action violates the guaranties of free assembly and free speech guaranteed by the First Amendment.

As long as the would-be preacher is obliged to go to the police station, to wait upon the officer, to sit by until some busy administrator considers a speech that he wishes to make, to wait until the latter has time to determine if a meet-

ing can be or cannot be held, and then wait until a trial and appeal to the Supreme Court of New Hampshire to get a legal opinion upon the issue; then he is denied the free exercise of his liberties. Will the writ of mandamus restore the time lost? Suppose a preacher or politician were traveling through the State making a peripatetic tour speaking on his doctrines but, instead of being at liberty to start speaking in each town, he would first be obliged to deal with the local police and appeal civil proceedings and wait for the judges to act at their pleasure. Would he be free to exercise his right to preach, to lay his oral opinions before the public? Obviously no! For such an activity, liberty would be effectively destroyed, even if in each town the courts were to give the permit. By the time the traveler waited for a decision in each place, he may as well surrender his constitutional rights to the 'village tyrants' and give up the thought of reaching the people in this manner. See *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, at p. 638. Dissemination of information would be effectively hamstrung, strangled and killed in New Hampshire.

Appellant is not obliged to comply with an unauthorized demand before defending a prosecution. Every American citizen has the right to have his case tried by the courts, not by the police.

If the officer does not have the power claimed, then his grant or refusal of the permit would be equally a nullity. Whether he has the power is a living legal issue before the Court. His possible abuse of it is irrelevant.

On this point this Court said in *Thornhill* v. *Alabama*, 310 U. S. 89: "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." See also *Schneider* v. *New Jersey*,

308 U. S. 147, 156-165; *Hague* v. *C. I. O.*, 307 U. S. 496, 516; *Lovell* v. *Griffin*, 303 U. S. 444, 451.

How can appellant be asked to spend time and money asking for a mandamus directed to officials who have defied the Constitution? Before being required to take such an empty procedure, appellant is entitled to have his preliminary question answered: Is this ordinance valid as construed and applied? The basic invalidity of the application and construction of the law immediately ousts the argument that a mandamus must first be sought.

Even assuming that mandamus would lie, it still does not alter the fact that this ordinance as enforced is not only an infringement, but the means of destroying the freedom of assembly and speech from every practical standpoint. Suppose one desires to hold a certain assembly to criticize one of the parties to an election to be held one month hence. The council may refuse to grant the permit. By the time the would-be speaker can get through the courts two or three years may have gone past. Perhaps he has spent all his money getting prepared for the assembly in the first place and does not have the few thousand dollars to spend in litigation; so the right to a free assembly for the poor is entirely abrogated. What the citizen may have to say may be of real value; yet he is prevented from speaking.

Let us assume that one is a poor man with some very important political submission to make to the people. Possibly he has found some great corruption in the police department, the city council or on the part of some other official who is supported and abetted by the city council. The reformer often finds his cause unpopular; one can almost say that the more need there is for a reformation, the greater is the possibility that there will be somewhere a powerful vested interest in the present corruption.

And so the sovereign citizen in all sincerity spends money getting ready to expose these disturbing facts that he has

ascertained. He is told: "Yes, there is free assembly in this country. You may freely state your opinions; but before you can speak or assemble one minute, you must be prepared to take a mandamus against the city council, which before it is finished will most probably cost thousands of dollars." For the rich man this may not be an insuperable obstacle. For the great proportion of the citizens such a view of the law amounts, from a practical standpoint, to a complete prohibition. It is not only the rights of the wealthy and powerful political organizations that must be maintained. The law is no respecter of persons. This Court is just as much concerned with the liberty of the average citizen and the contribution that he can make to the welfare of the nation. The sovereign people are entitled to have their rights protected and not after overcoming the hurdle of huge and disproportionate legal expenses in mandamus proceedings that amount to clear abridgment.

Quite apart from the destroying financial burden of such litigation is the time factor required for the seeking of judicial review of the refusal of the permit. The speaker who wishes to comment upon an election to be held one month hence would not receive much comfort from the assurance that he is entitled to go to court and carry through a couple of appeals before being entitled to present his thoughts to the people. Even suppose he won the case; how much better off would he be with the knowledge that he now has a right to speak and assemble to deal with the outcome of an election that is already a year or two past? This whole argument of the court below makes a farce of the democratic process and totally removes the practical value of liberty of expression.

In times of emergency it is often essential that it be possible to move quickly and immediately to make information known to the people. There are times when the public officials are not too anxious to move on a problem or are afraid

to move. Freedom of the people to agitate for changes may result in something being done before it is too late.

Witness the situation in France during World War II: the country was riddled with fifth columnists, often in high places. It can happen here! If public spirited citizens were at liberty to address the populace, it might be possible to cut out and throw away corruption in office about which much is being said now in election talks or to remove unfaithful officials before it becomes too late. If, however, each of them—the local official or judge—is able to stand athwart the channels of communication, he could prevent the information from reaching the sovereign people before it was too late. In time of invasion, insurrection, corruption in office, pestilence or other serious emergency, it is often essential that the populace have available speedily independent views on the situation separate and apart from the inertia of officialdom.

On the view of the law taken by the New Hampshire Supreme Court and the demand that the officials be permitted to deny the permit subject only to judicial review by mandamus, the value of a free assembly and free speech, from the standpoint of a vital, healthy weapon ready for emergencies and also as something which is open to use by all people, rich and poor alike, would be lost.

It is respectfully submitted that the construction and application of the ordinance and the law of New Hampshire so as to require the appellant to bring a mandamus action or certiorari proceedings in order to preserve his constitutional rights and forfeit his rights to a defense in a criminal proceeding brought to enforce the administrative order denying the permit violate the rights of freedom of speech, assembly and worship, contrary to the First and Fourteenth Amendments to the United States Constitution.

The denial of a defense in this criminal proceeding because the appellant has not sought a writ of mandamus or

certiorari to review an administrative order made the basis of the prosecution is a violation of the Fourteenth Amendment. Reference is again made to *Royall* v. *Virginia*, 116 U. S. 572, where this Court said: "To punish him for practicing it without a license thus withheld is equally a denial of his rights under the Constitution of the United States. . . ." (116 U. S. 583) See also *Thornhill* v. *Alabama*, 310 U. S. 88, at pages 95-98, and cases cited.

In *McVeigh* v. *United States*, 11 Wall. 259, 267, the Court said that when one is assailed by an indictment or proceeding in the United States District Courts, "he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

The doctrine of denial of defenses because of contempt of the law and flouting the orders of administrative and judicial officers has never been approved. In *Hovey* v. *Elliott*, 167 U. S. 409, 413, 414-415, 417-418, this Court reversed a judgment where the answer of the defendant had been stricken because of contempt of court. The Court held that the entry of judgment without affording an opportunity to defend was a violation of the citizen's rights of due process. The right to attack an administrative order on the ground of its illegality, in defense to an indictment, is supported by *Windsor* v. *McVeigh*, 93 U. S. 27, 277-278.

In instances where this precise question has been taken before the appellate courts of some of the other states, it has been held that one proceeded against in a criminal prosecution may show in defense thereto that the administrative determination was illegal, in excess of authority conferred by the statute, arbitrary and capricious, or contrary to the undisputed evidence. *People* v. *McCoy*, 125 Ill. 289, 17 N. E. 786; *Fire Department of City of New York* v. *Gilmour*, 149 N. Y. 453, 44 N. E. 177; *State* v. *Rachshowski*, 86 Conn. 677;

People v. *Kaye*, 212 N. Y. 407, 416; *State* v. *Weimar*, 64 Iowa 243; *State* v. *Kirby*, 120 Iowa 26; *Crane* v. *State*, 5 Okla. Cr. 560; *Richter* v. *State*, 16 Wyo. 437; *Stevens* v. *Casey*, 238 Mass. 368, 117 N. E. 599.

The point made here is demonstrated and supported by the tax assessment cases in New York State. The exclusive remedy prescribed for review of arbitrary and capricious fact and law determinations by tax assessors is certiorari. See Article 13 of the Tax Law of New York. Where the assessors, however, impose taxes upon property exempted by the Constitution and statute, the New York courts recognize that a legal attack can be made collaterally in an action to remove a cloud from the title of the property on the theory that this is an illegal and unconstitutional administrative enforcement of the tax law. See *Elmhurst Fire Co.* v. *City of New York*, 213 N. Y. 87; *People* ex rel. *Erie Railroad Co.* v. *State Tax Commission*, 246 N. Y. 322.

There is no reasonable basis for the denial of the right to be heard in defense to the prosecution. How is the State to be hurt by allowing one charged with speaking in a park without a license permit properly applied for to challenge the constitutionality of the denial? Ultimately it is the same court that decides the matter whether it is by mandamus, certiorari or criminal proceedings. The powers of the criminal court are as broad as the powers of the civil court. It seems highly unreasonable and hyper-technical to hobble the judge of the criminal court and forbid him from doing justice. The present case is a typical example of the absurdity of the procedure established. In the case the court heard the evidence as extensively as it could have been received in a mandamus or certiorari proceeding. Yet the doctrine of *State* v. *Stevens*, 78 N. H. 268, has blinded the court below to justice. What good comes to the procedure of New Hampshire by forcing this conclusion? The burden on the courts is no different whether it be by criminal pro-

ceedings or by civil that the invalidity of the denial is considered.

The reasons against the doctrine of the *Stevens* case are much stronger. The welfare of the people is served best by granting a hearing in a criminal case brought to enforce the order of the administrative agency where there has been no civil review. The citizen is entitled to his day in court, especially in criminal proceedings. It brings criminal proceedings and the courts into disrepute to deny the right of self defense, which is accorded even by the barbarians. Through niceties and the doctrine of convenience the court below has denied just that—appellant's right to self defense.

Such doctrine sets a trap for the unwary. The citizen who attempts to exercise his civil liberties falls through the trapdoor of the doctrine of *State* v. *Stevens*, 78 N. H. 268. While attempting to hold secure his rights, he finds that a gin is set for him by the Supreme Court of New Hampshire in the *Stevens* case, *supra*. It is penalizing to ordinary citizens, many of whom are ignorant of the procedural niceties and technicalities of criminal procedure, to catch them unawares in the insidious *Stevens* doctrine. What does the State profit by such rule? How is the State injured by allowing a defense?

It is respectfully submitted that the holding in this case has denied the appellant his procedural rights in criminal cases guaranteed by the Fourteenth Amendment. For this reason alone the jurisdiction ought to be noted.

The holding of the court below in this case so as to follow *State* v. *Stevens*, 78 N. H. 268, ought to be reversed and the decision in that case set aside because the law of New Hampshire has been construed in such a manner as to deny a judicial trial, thereby converting the law into a bill of attainder, contrary to the provisions of Clause 1, Section 10, Article I of the United States Constitution.

This point was not raised in the trial court. It was not raised in the Supreme Court of New Hampshire until the motion for rehearing was filed. In that motion it was explicitly raised. It is the belief of appellant that, although belatedly raised, it was considered and determined by the Supreme Court of New Hampshire on the denial of the motion for rehearing.

The authorities supporting the contention that the denial of the right to challenge the constitutionality of the ordinance as construed and applied constitutes a bill of pains and penalties are *Cummings* v. *Missouri*, 4 Wall. 277, 320-321; *United States* v. *Lovett*, 328 U. S. 303; *Kentucky* v. *Jones*, 10 Bush (70 Ky.) 725; *In re Yung Sing Hee* (Circuit Court) 36 F. 437 (1888) and *Davis* v. *Berry*, 216 F. 413.

The Decision of the Court Below Is Not Adequate to Support the Judgment on Non-Federal Grounds

This Court is the tribunal to determine whether the non-federal ground is substantial. *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773. The evasive decision by the court below which did not consider the question raised is not conclusive on this Court.

The determination that appellant must first sue for a writ of mandamus instead of exercising his constitutional liberty is a burden and an abridgment of the rights guaranteed by the First Amendment that itself constitutes a federal question: "Where the non-Federal ground is so interwoven with the other as not to be an independent matter . . . our jurisdiction is plain." (*Enterprise Irrigation Dist.* v. *Farmers' Mutual Canal Co.*, 245 U. S. 157, 166.) The doctrine of *State* v. *Stevens*, 78 N. H. 268, was perhaps sufficient for general rights but, when applied, itself became a burden on freedom of speech and assembly under the holding of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, at page 306, and *Near* v. *Minnesota*, 283 U. S. 697.

When the history of the consideration of this question

is considered it is apparent that the Supreme Court of New Hampshire is arbitrarily employing a device to prevent a review of the federal question. On certified questions it found enforcement of the ordinance to be valid under the Federal Constitution because of the unwritten policy of the city council to zone the parks, permitting meetings of a religious nature in some and denying in others. When the question was brought back to it the second time it was evaded because of the failure to apply for a writ of mandamus. It is submitted therefore, that review by this Court cannot be evaded by the Supreme Court of New Hampshire by a non-federal ground "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District* v. *Farmer's Mutual Canal Co.*, 243 U. S. 147, at page 164. See also *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 22; *Postal Tel. Cable Co.* v. *Newport*, 247 U. S. 464, 475-476; and *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 282; *Rogers* v. *Alabama*, 192 U. S. 296, 230-231; *Davis* v. *Wechsler*, 263 U. S. 22, 24; and *Brown* v. *Western Railway*, 338 U. S. 294, 299.

Where, as here, a determination by a state court is placed solely upon grounds of state or general law, but a federal claim was timely and properly asserted in the state courts, the failure of the state courts to pass upon the federal question thus asserted is not conclusive upon the Supreme Court of the United States. It will proceed to determine whether the non-federal ground of decision independently and adequately supports the judgment. *Chicago, B. & Q. Ry.* v. *Illinois* ex rel. *Drainage Comm'rs*, 200 U. S. 561, 580; *West Chicago St. R. Co.* v. *Illinois* ex rel. *City of Chicago*, 201 U. S. 506, 519-520; *Wood* v. *Chesborough*, 228 U. S. 672, 676-680.

It is submitted that the procedural basis for the affirm-

ance was not a sufficient non-federal ground to support the judgment below.

Conclusion

The decision of the Supreme Court of New Hampshire, affirming the judgment of the Superior Court, is plainly erroneous on the question of the denial of the right of appellant to make his defense and, because it defies and flouts the holdings of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296 and *Royall* v. *Virginia*, 116 U. S. 572, the judgment of the Supreme Court of New Hampshire ought to be vacated and the cause remanded to it with directions to consider and determine the constitutional question evaded by it twice, once in 97 N. H. 91, 81 A. 2d 312, and again in 88 A. 2d 860.

In 97 N. H. 91, the court stated the question involved on this appeal to be: "Whether a city could prohibit religious meetings in all of its parks is a doubtful question which we need not decide in this case." The court skipped the question on a false finding, disputed by the testimony of councilmen in the trial of this case, that Portsmouth had zoned its parks, allowing religious meetings in some and prohibiting them in others, including the park in question.

When the court was confronted with the erroneousness of its out-of-the-record finding on the appeal following its answer to the certified questions, the court again dodged the issue by resorting to the device of holding that appellant was estopped now to contest the validity of the ordinance in the criminal proceedings.

It can be seen that the basic question has not been decided, as it was by the Supreme Court of Wisconsin, in *County of Milwaukee* v. *Carter*, 258 Wis. 139, 45 N. W. 2d 90. The Supreme Court of Rhode Island has decided this same question adversely to appellant here. See the opinions in *State* v. *Fowler*, 83 A. 2d 67, and *State* v. *Fowler*, decided August 12, 1952, which appear as Appendix A and Appendix B to

the statement as to jurisdiction filed in *Fowler* v. *State of Rhode Island* in this Court as a companion case to this case. See also the recent decision by this Court in *Zorach* v. *Clauson*, 72 S. Ct. 679. The policy of the city council of Portsmouth not to permit religious talks and meetings to be held in the public parks, held to be arbitrary and capricious by the Superior Court and not determined by the Supreme Court of New Hampshire, conflicts with the two preceding decisions. It is a question that ought to be ultimately determined in this case by this Court. Compare *McCollum* v. *Board of Education*, 333 U. S. 203.

It is, therefore, proper to vacate the judgment and remand the case to the court below as was done in *Musser* v. *Utah*, 333 U. S. 95, so that the Supreme Court of New Hampshire may at last pass on the question that it has escaped so far.

In the event, however, that this Court reaches the conclusion that the judgment ought to be not vacated upon a consideration of the statement as to jurisdiction alone, then the appellant prays that the Court note jurisdiction of this cause for final hearing upon all the questions in accordance with the Rules of the Court, because the court below has disposed of important and substantial federal questions in a way that is in conflict with the Constitution of the United States and applicable decisions of the Supreme Court of the United States, and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for exercise by the Supreme Court of the United States of its power of supervision and review to halt the same.

Respectfully submitted,

HAYDEN C. COVINGTON,
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Brooklyn 2, New York,
Counsel for Appellant.

APPENDIX A

OPINION AS MODIFIED JUNE 3, 1952

Rockingham,
April 26, 1952.

No. 4113

STATE

v.

WILLIAM POULOS & A

Appeals, from the municipal court of Portsmouth. In that court on complaints the two defendants were found guilty of conducting on specified dates without being licensed open air public meetings in Goodwin Park, which abuts Islington Street in the city of Portsmouth. These are the same cases that were transferred by the Superior Court in advance of trial on an agreed stipulation of the facts, and that were reported in 97 N. H. 91. The controlling ordinance is found in chapter 24, article 7 of the ordinances of the city of Portsmouth. It is given in full in the report of the previous transfer.

The two complaints were tried jointly and *de novo* in the Superior Court following the opinion of this court, which opinion held that the ordinance was constitutional as therein stated. The right to jury was waived. It is conceded by the defense that many of the facts, including the lack of licenses, established by the testimony are substantially the same as those stipulated for use at the former transfer. The Court returned verdicts of guilty and filed findings and rulings as follows:

"These cases are appeals from the Portsmouth Municipal Court. The complaints charge the respondents with the violations of Chapter 24, Article 7, section 22, of the Municipal Ordinances of the City of Portsmouth, Section 22 reads as follows:

" 'Sec. 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no

parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the city council.'"

"The respondents admit violations of the ordinance but take the position that the refusal of the Portsmouth City Council to issue licenses to them to speak on religious topics in Goodwin Park, a public park in Portsmouth, was arbitrary and unreasonable and that their constitutional rights of freedom of assembly, freedom of speech and freedom of worship have been violated contrary to the Bill of Rights of the New Hampshire Constitution and the First and Fourteenth Amendments to the Constitution of the United States.

"The constitutionality of the statute, Revised Laws, Chapter 174, sections 2 and 4, by virtue of which the city ordinance was enacted, was settled in the Supreme Court of the United States in Cox vs. New Hampshire, 312 U. S. 569, and cannot now be questioned in these proceedings.

"The respondents could have raised the question of their right to licenses to speak in Goodwin Park by proper civil proceedings in this Court, but they chose to deliberately violate the ordinance.

"Verdict of guilty against both respondents."

The Court imposed a fine of $20 on each defendant.

Exceptions were duly taken to the verdicts and the rulings of the court and a bill of exceptions was allowed both defendants by *Westcott*, J.

It is suggested that since the trial in the Superior Court the defendant Derrickson has died.

Gordon M. Tiffany, Attorney General, and Arthur J. Reinhart, city solicitor, for the State.

Hayden C. Covington (of New York) and Henry M. Fuller (Mr. Covington orally), for the defendants.

JOHNSTON, C. J.:

Since the defendant Derrickson has died pending his appeal, the appeal on his behalf is abated. 24 C.J.S. 381, and cases cited; 96 A.L.R. 1317, 1322.

The Trial Court found that the city council in refusing to

grant licenses to the defendants acted arbitrarily and unreasonably. The latter had offered to pay any reasonable fees customarily paid for the use of the park as well as any expenses incurred by the city in permitting the holding of the requested meetings. However, if the Court was correct that the remedy for such wrongful conduct was in appropriate civil proceedings and not in holding open air meetings in violation of the ordinance, the exceptions of the surviving defendant should be over-ruled. According to the Court, the defendants misconceived their remedy. It has been conceded by the defense on this transfer, as well as on the first one, that the ordinance is valid on its face. It is identical in language with the statute that was construed as valid in *State* v. *Cox*, 91 N. H. 137, which was affirmed in *Cox* v. *New Hampshire*, 312 U. S. 569. It is not disputed that the ordinance applies to the park that was the scene of the open air meetings in question. No objection has been made to the application of the ordinance to the areas where the meetings took place, and no exception taken to any finding or ruling with respect thereto.

We see no reason for overruling the law as stated in this jurisdiction that a wrongful refusal to license is not a bar to a prosecution for acting without a license. "A wrongful refusal of a license is not equivalent to a license. Instead of prosecuting by proper proceedings his claim of right to a license, the defendant chose to disregard the law and must submit to the penalty." *State* v. *Stevens*, 78 N. H. 268, 270. It should be noted that the statutory provision for a penalty in case of a sale by an unlicensed person was held valid, even if a clause of another section with respect to a requirement of residence should be found invalid. This case clearly set forth the procedure to be followed in New Hampshire by one who has wrongfully been denied a license. What was there stated on page 270 applies to the present case. "The defendant had an ample remedy in the writ of certiorari."

The Yale Law Journal in an article on "Res Judicata," v. 49, p. 1266 asserts as follows: "The action of state licensing agencies has uniformly been held to be conclusive against collateral attack. . . . No distinction has been made between errors of fact or of law in the mistaken re-

fusal to grant the license. The same result has been reached even where the denial of a license was based on an unconstitutional section of a statute, provided that the entire statute was not thereby rendered invalid." The writer also cites *State* v. *Stevens, supra,* as authority. See also, *Phoenix Carpet Co.* v. *State,* 118 Ala. 143.

The New Hampshire case of *State* v. *Stevens, supra,* has been cited as authority in the Massachusetts case of *Malden* v. *Flynn,* 318 Mass. 276. On pages 280 and 281 the court there stated: "The invalidity of the rule of the board of health, however, gives the defendant no right to transport garbage through the streets of Malden without a permit in violation of *s.* 31A. *Commonwealth* v. *Blackington,* 24 Pick. 352; *Commonwealth* v. *McCarthy,* 225 Mass. 192; *Commonwealth* v. *Gardner,* 241 Mass. 86; *State* v. *Orr,* 68 Conn. 101; *State* v. *Stevens,* 78 N. H. 268. The defendant was entitled to have his application for a permit considered fairly and impartially by the board and might have maintained a petition for mandamus if the board refused to consider it, . . ."

The same principle of law is clearly stated in *Lipkin* v. *Duffy,* 118 N. J. L. 84, the headnote of which is as follows: "The provision of an ordinance that a license to carry on the business of conducting a junk yard should not be issued to a non-resident is unreasonable and discriminatory, but the remedy is by *mandamus* to compel consideration of the application for a license and not by the conduct of such business in violation of the valid portions of the ordinance without any license whatever."

While 33 Am. Jur. 395 in the article on "Licenses" takes the position that the cases are not unanimous, it uses *State* v. *Stevens, supra,* in support of the following: "According to other cases, however, when a license is refused by the licensing officer, although the applicant has done all that is necessary to entitle him thereto, he has no right to proceed to do the act for which the license is required." 53 C. J. S. 727, in its article on "Licenses" discusses the subject of defenses to criminal proceedings for violation of license laws. The following is stated: "The fact that accused had applied for the requisite license, tendered the fee, and had been refused a license constitutes no defense to a criminal

prosecution for acting without a license unless the license authorities declined to issue a license on the ground that none was required; and it is likewise no defense to show that an application for a license would have been unavailing." As authority for the first proposition, *Commonwealth* v. *McCarthy*, 225 Mass. 192, which was referred to in *Malden* v. *Flynn*, *supra*, is used.

The defense relies heavily on the case of *Cantwell* v. *Connecticut*, 310 U. S. 296, for the proposition that the availability of the writ of *mandamus* under Connecticut law to review the action of the administrative officer in refusing a permit was not sufficient to preclude the court from considering the constitutional defenses. It must be noted, however, that in that case the entire licensing statute was held invalid as it was applied to persons engaged in distributing literature purporting to be religious and soliciting contributions to be used for the publication of such literature. The situation is different from that referred to in the Yale Law Journal, *supra*, and in *State* v. *Stevens*, *supra*, where the entire statute is not rendered invalid, so that convictions may be had under valid portions. Again we call attention to the fact that in this jurisdiction if a licensing statute is constitutional and applies to those seeking a license, the remedy here provided consists of proceedings against the licensing authority that has wrongfully denied the license. The substantial rights of the defendants to licenses are not here refused, but the manner in which they may be exercised must be defined in the licensing proceedings originating before the council. Their remedy was against the City Council of Portsmouth but they chose not to follow it.

Similarly, it was held in *Hague* v. *C.I.O.*, 307 U. S. 496, that municipal officers could be enjoined from action under certain ordinances that violated the constitutional rights of free speech and of assembly. Permits had been refused for public meetings, but, unlike the case at bar, the prosecutions were contemplated under ordinances that were invalid. "We think the court below was right in holding the ordinance quoted in note 1 [relating to public meetings] void upon its face." *p.* 516. Concerning the ordinance dealing with the distribution of printed matter the court said at

page 518: "The ordinance absolutely prohibiting such distribution is void under our decision in *Lovell* v. *Griffin*, *supra*, and petitioners so concede."

In *Estep* v. *United States*, 327 U. S. 114, the court decided that in a proceeding for a violation of the Selective Training and Service Act of 1940 a defendant could show that the order of the local board exceeded the jurisdiction of the board since he had exhausted his administrative remedies. The board had wrongfully denied the defendant an exemption as a minister of religion. It was not necessary to comply with the order and then resort to *habeas corpus* to complete the civil remedies. *Gibson* v. *United States*, 329 U. S. 338, was similar in its facts and holding. In the case before us the defendant Poulos has not taken advantage of an available and proper remedy against the licensing authority. Moreover, he has been prosecuted under a valid ordinance which requires a license before open air public meetings may be held. The State's case was complete upon showing the conduct and the absence of the license. The valid ordinance then governed. It was not necessary for the State to show the rightful denial of the license. In the *Estep* and *Gibson* cases, it was essential for the government to establish the orders of the local boards before it could convict for failure to comply with those orders. These two last mentioned cases are similar to the prosecutions for failure to comply with orders of quarantine issued by health officers cited in the brief for the defense. In such case the order and its validity, if questioned, must be established by the prosecution.

The remedy of the defendant Poulos for any arbitrary and unreasonable conduct of the city council was accordingly in *certiorari* or other appropriate civil proceedings. *American Motorists Ins. Co.* v. *Garage*, 86 N. H. 362, 368.

State v. Derrickson abated; exceptions of defendant Poulos overruled.

All concurred.

APPENDIX B

OPINION

No. 4042

Rockingham,
June 5, 1951.

STATE

v.

ROBERT W. DERRICKSON

STATE

v.

WILLIAM POULOS

Complaints, for conducting open air public meetings in Goodwin Park, which abuts Islington Street in the city of Portsmouth, on the afternoons of Sunday, June 25, 1950 and July 2, 1950, without a permit therefor contrary to the requirements of chapter 24, article 7 of the municipal ordinance of the city of Portsmouth. The ordinance is as follows:

"Section 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the City Council.

"Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open air public meeting.

"Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such license shall perform or exhibit or such parade, procession, or open air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.

"Section 25. Penalty. Any person who violates section 22 of this article shall be fined Twenty Dollars."

Upon appeal *de novo* to the Superior Court from the municipal court of Portsmouth, the defendants before trial moved to dismiss the complaints on the ground that the ordinance as applied was unconstitutional and void. Pursuant to an agreed stipulation of the facts by the parties the question so raised was transferred without ruling by *Goodnow*, C. J.

The congregation of Jehovah's witnesses "acting through the defendants, Derrickson and Poulos, made application to the city council of the City of Portsmouth for a license to hold a public meeting in Goodwin Park. A written petition was duly addressed to the city council of Portsmouth and filed with the clerk. They were informed that they could appear and speak in behalf of the petition before the city council. The petition was placed on the agenda for hearing May 4, 1950. On that date the defendants appeared before the city council, the defendant Derrickson doing the speaking in behalf of the congregation of Jehovah's witnesses. The congregation offered to pay any reasonable fee customarily paid for the use of the park as well as any expenses incurred by the city in permitting the holding of the requested meeting. The defendants gave the names of the Bible talks to be delivered and the date, time and place of the proposed assemblies in the park in question."

After a full hearing before the city Council "the petition of the defendants was denied because the members of the council stated that they had never received a petition of a religious group to use the public parks and they were fearful of creating a disturbance if the application was granted and the assembly held." Thereafter the defendants on Sunday afternoon, June 25, and July 2, 1950, held their meetings without a license. The defendant Derrickson was not allowed to continue after speaking for forty-five minutes and the defendant Poulos was not allowed to continue after speaking about fifteen minutes. No disturbance resulted from the meetings.

Gordon M. Tiffany, Attorney General, *Glenn Davis*, Law

Assistant and *Arthur J. Reinhart*, City Solicitor (*Mr. Tiffany* and *Mr. Reinhart* orally), for the State.

Hayden C. Covington (of New York) and *Henry M. Fuller* (*Mr. Covington* orally), for the defendants.

KENISON, *J.*:

The Bill of Rights of the Constitution of New Hampshire does not guarantee to every individual or to every group of individuals absolute liberty. "When men enter into a state of society, they surrender up some of their natural rights to that society in order to ensure the protection of others; and, without such an equivalent, the surrender is void." N. H. Const. Part First, *Art.* 3rd. The rights of freedom of assembly, speech and worship are accorded a high place in and are specifically guaranteed by the New Hampshire Constitution and statutes implementing it. While these freedoms cannot be prohibited, they may be subjected to reasonable and nondiscriminatory regulation in order that the constitutional rights of others may be equally protected in the interest of public order and convenience.

The ordinance drawn in question in this case is copied from the statute which was construed as valid in *State* v. *Cox*, 91 N. H. 137 and affirmed by a unanimous court in *Cox* v. *New Hampshire*, 312 U. S. 569. The construction placed on the statute in that case (R.L., *c.* 174, *ss.* 2, 4) is the construction that must be given to sections 22 and 24 of the ordinance. "The discretion thus vested in the authority (city council) is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has and the legislature attempted to delegate, no power if did not possess." *State* v. *Cox*, *supra*, 143.

The defendants dismiss the applicability of this case briefly in the following manner: "The *Cox* case is distinguishable here because in this case the respondents have

attempted to comply with the ordinance and offered to pay the necessary fee and expenses." It is doubtful that it makes any critical constitutional difference as to the validity of an ordinance or statute that there was no compliance in one case or attempted compliance in the other. However, we do not pause to examine this contention with any more detail than was advanced in its behalf since the defendants have chosen to place their chief reliance on the recent case of *Niemotko* v. *Maryland*, 340 U. S. 268, which will be hereinafter discussed.

We do not know the number of parks, public commons, public squares and other public grounds in the city of Portsmouth, although it is a matter of public knowledge that Goodwin Park is not the only one in the city (*Sherburne* v. *Portsmouth*, 72 N. H. 539) and that it is a small park. There is nothing to indicate that it has been used for religious meetings or sectarian purposes since it was donated to and dedicated by the city more than a half century ago. See Portsmouth City Reports 1887, page 12; Annual Report City of Portsmouth 1888, page 13; Gurney, Portsmouth Historic and Picturesque 1902, page 64. It cannot be argued that this is a recent discrimination against Jehovah's witnesses since the denial of the park for religious and sectarian meetings is consistent with a definite and systematic policy which treats the Jew, the Catholic, the Protestant and the Jehovah's witness alike.

If the city of Portsmouth wishes to use one of its small parks for other public purposes and to prohibit its use for religious and sectarian meetings in a nondiscriminatory way, constitutional rights are not abridged if there are still adequate places of assembly for those who wish to hold public open air church meetings. If the right to hold a church meeting on public property is to be given a preferred position, it does not necessarily follow that that right can be exercised in every park at any time that a certain group desires to do so. The privilege of people to seek peace and sanctuary in a public park, the privilege to be let alone and the privilege not to be subject to oral aggression of a religious nature on Sunday are entitled to some consideration. If they are allowed to abridge or

unreasonably impair the freedoms of free speech, assembly and worship they are unconstitutional. If such privileges are provided for in a systematic and nondiscriminatory way so that the freedoms of speech, assembly and worship can be adequately exercised within a city the Constitution is no bar to their enforcement.

In the present case we have an ordinance which the defendants have conceded to be valid on its face. The ordinance has been construed by this court and the Supreme Court of the United States in such a way that no discriminatory or unfair abridgment is reasonably possible. This is not a case like *Niemotko* where there was an amorphous, indefinite and nonstatutory policy. In *Niemotko* the applicants were questioned by the city council in a way which clearly indicated prejudice, bias and the consideration of immaterial matters. Those factors are not present in this case. In *Niemotko* the city had previously permitted gatherings by religious groups which is not the case here. In *Niemotko* it was evident there was a previous restraint under an indefinite licensing system which in effect regulated the use of public parks according to the nature of the applicant and the content of his speech. No such attempt is present in this case.

The persistent and perplexing problem of making a reasonable and nondiscriminatory accommodation when fundamental rights collide cannot be solved in a vacuum. The factual situation is therefore extremely important in every case.

The record before us presents an ordinance valid on its face and without any evidence of discrimination in the manner in which it is construed and applied. The defendants have assumed in their argument the question before this court is whether religious meetings can be prohibited in public parks. The issue which this case presents is whether the city of Portsmouth can prohibit religious and church meetings in Goodwin Park on Sundays under a licensing system which treats all religious groups in the same manner. Whether a city could prohibit religious meetings in all of its parks is a doubtful question which we need not decide in this case. What we do decide is

that a city may take one of its small parks and devote it to public and nonreligious purposes under a system which is administered fairly and without bias or discrimination.

No question is presented in this case as to the validity of the fee charged for the use of the park in certain cases. The fee, which is usually nominal and frequently nonexistent, in no event can exceed the reasonable costs of policing the requested meeting.

The fact that some members of the city council thought the granting of a license for a church meeting in Goodwin Park would create a disturbance does not change the result. Although it was an erroneous and insufficient reason for denying the license (*Kunz* v. *New York*, 340 U. S. 290), it has long been the rule in this State that a wrong reason for a correct decision does not invalidate the decision. The main reason for denying the license was the municipal policy of restricting Goodwin Park to nonreligious public purposes and under the factual circumstances of this case was a proper one. See *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 341.

Reliance is also placed on *County of Milwaukee* v. *Carter* (Wis.) 45 N. W. (2d) 90, where an ordinance prohibiting religious services in public parks was held unconstitutional. That case is not in point since it purported "not to regulate but to prohibit speech in public parks on political as well as religious subjects." At this juncture it is important to state that in sustaining the Portsmouth ordinance no reliance is placed on *Davis* v. *Massachusetts*, 167 U.S. 43, which is believed to have been so eroded by the force of time and recent decisions as to be valueless as a binding precedent.

Finally mention should be made of the judicial climate in which the Portsmouth ordinance is to be construed and applied. In their consistent effort to vindicate their civil rights, Jehovah's witnesses have been accorded protection here at times when and under circumstances in which these rights were not protected elsewhere. *State* v. *Lefebvre*, 91 N. H. 382; *Prince* v. *Massachusetts*, 321 U. S. 155; *State* v. *Richardson*, 92 N. H. 178. While they have not been allowed to push free speech to the point of abuse (*State*

v. Chaplinsky, 91 N. H. 310; *Chaplinski* v. *State of New Hampshire*, 315 U. S. 568), limitless discretion, arbitrary action and discriminatory practice on the part of municipal officers have never been allowed against Jehovah's witnesses. There is nothing in the record in this case to raise an inference that Portsmouth is guilty of palpable evasion of the defendants' rights under any guise whatever. On the contrary the city has enforced with respect to one small park an honest, reasonable and nondiscriminatory licensing system which operates fairly on all.

Case discharged.

All concurred.

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Supreme Court of the United States

OCTOBER TERM 1952

No. 341

WILLIAM POULOS,

Appellant

v.

THE STATE OF NEW HAMPSHIRE

Appellee

APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

APPELLANT'S REPLY TO OPPOSITION TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

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MAY IT PLEASE THE COURT:

The statement made in opposition to jurisdiction by the appellee, if relied upon without scrutiny, will lead this Court to the erroneous conclusion that no federal question was presented by appellant in the state court or is involved

upon this appeal. While the jurisdictional statem
sufficient on these points, to lighten the labor of the
and to help the Court avoid the confusion that the a
is captured by, this reply is made.

I

It is contended that no attack was made on the "r
ableness of the action of the City Council". See pag
the statement by appellee. In order to rely on the
stitutionality of the enforcement of the ordinance
Portsmouth policy to exclude religious meetings fro
park, it was not necessary to add to the charge of a vio
of the Federal Constitution that the enforcement wa
reasonable". The unreasonableness is implied in the c
that appellant's constitutional rights were violated b
City Council. Moreover, the sufficiency of the federal
tion is not dependent upon the word "unreasonable".

II

The statement is made by the appellee that the e
tion to the denial of the motion to dismiss and to
a judgment of acquittal is *limited* to the grounds tha
denial of the permit was *arbitrary and capricious and*
it was the duty of the City Council to issue the pe
This statement is untrue. The motion in the trial court
not thus limited. The motion stated that the denial o
permit was an unconstitutional enforcement of the
nance so as to abridge the rights of appellant, and th
the appellant was convicted by the court under the
nance he would be denied his rights of freedom of assem
speech and worship contrary to the First and Fourte
Amendments to the United States Constitution. Excep
was taken to the denial of this motion. The constituti
question presented in the trial court was also raised
exception in the Supreme Court. The description of

unconstitutional action by the City Council as "arbitrary and capricious" did not limit or nullify the federal question presented that the construction, application and enforcement of the ordinance violated the rights of appellant contrary to the First and Fourteenth Amendments.

III

Much is made by appellee over the failure of the court to discuss the federal question in its opinion, and the failure of the appellant to get a certificate from the Supreme Court of New Hampshire that it determined the federal question. While it is true that a discussion of the federal question in the opinion or the certificate would help the appellant to stop the mouth of appellee on the determination of the question, neither of those elements is a prerequisite to the presence of the federal question. The question was actually and properly raised in the record. The New Hampshire courts evaded the question by ignoring the federal grounds raised in the motion, and by considering the motion and the exception as though the only point raised was the state question of 'arbitrariness and capriciousness'. The ignoring of the point of the motion raising the federal question was patently an evasion of the question. The courts below were not permitted to consider only the state question raised in the motion and to ignore the federal question. It was arbitrary, capricious, and a violation of the Federal Constitution for the courts below to resort to the trick of erasing the federal question from the motion. They should have taken the motion in its entirety, as was done in *State* v. *Cox*, 91 N. H. 137, affirmed *Cox* v. *New Hampshire*, 312 U. S. 569, rather than indulge in legerdemain.

It is, therefore, obvious that the failure to discuss the federal question in the opinion, as the court did in the *Cox* case, was not due to the question's not being raised. But it is apparent that the failure to discuss the question is

a subterfuge to shun and illegally elude the responsibilit
properly placed on the courts by the appellant in this cas

Since it is clear that there has been an illegal evasio
of the properly presented federal question, under the pre
text that only a state question is involved, it is neither nec
essary nor advisable that this Court wait for the appellan
to obtain a certificate from the Supreme Court of New
Hampshire.

If the right to get a determination of a properly raised
federal question, necessary to a decision of a case, is made
to depend upon a discussion of the federal question in the
opinion or upon the procurement of a certificate, then the
constitutional rights of appellants in federal cases pending
in state courts would depend exclusively upon the mercy of
the state courts. The jurisdiction of this Court is not so
easily evaded.

IV

It should not be overlooked that appellant contended
in the state courts and now urges that the construction of
the ordinance, so as to deny the right to challenge the con-
stitutionality of the ordinance as applied in this criminal
case, and the holding limiting the defense to mandamus or
certiorari, itself constitutes a burden upon freedom of as-
sembly, speech and worship contrary to the Constitution.
The state question of procedure in this case itself consti-
tutes a burden on rights guaranteed by the First Amend-
ment to the Federal Constitution. This question, therefore,
is properly before this Court.

This Court should notice that the courts below did not
expressly hold that the defense of unconstitutionality as
applied could not be considered. By silence and the refusal
to consider the point, properly raised in the motion, the
courts below implicitly held that the unconstitutionality of

the ordinance as construed and applied could not be considered.

V

It is erroneously stated by the appellee that the determination of the validity of the ordinance by the Supreme Court of New Hampshire in its first opinion did not go out of bounds of the decision in *Cox* v. *New Hampshire*, 312 U. S. 569, affirming *State* v. *Cox*, 91 N. H. 137. The opinion on certified question transferred by reserved case to the Supreme Court of New Hampshire by the Superior Court of New Hampshire does go beyond the *Cox* decision. The Supreme Court illegally grafted onto the ordinance the theory that the Council had zoned the parks, so as to permit religious meetings in some parks and deny them in others, including Goodwin Park where appellant spoke. The ordinance as construed, applied and enforced was held not to be an unconstitutional violation of appellant's rights for the reason of zoning. This theory of zoning was proved to be false, a figment of the imagination of the Supreme Court of New Hampshire, and a pretext not backed up by the facts. It was not supported by the stipulated facts in the reserved case. The denial of the permit by the City Council was for only one reason. That was the policy of the City of Portsmouth not to grant permits for religious meetings in the parks of the city. The courts of New Hampshire have approved the construction, enforcement, and application of the ordinance by the City Council over the objection of appellant, properly raised, that his rights guaranteed by the First and Fourteenth Amendments have been violated.

WHEREFORE, for the reasons above stated and for

substantial grounds shown in the jurisdictional state-
, jurisdiction in this case ought to be noted.

Respectfully,

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Attorney for Appellant

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Supreme Court of the United States

OCTOBER TERM, 1952

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BRIEF FOR APPELLANT

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Counsel for Appellant

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BRIEF FOR APPELLANT

Opinions Below

The court below wrote an opinion which is reported at 88 A. 2d 800. [61-66][1] An earlier opinion answering certified questions in this case appears at 97 N. H. 91, 81 A. 2d 312. [1-7]

Jurisdiction

The judgment of the Supreme Court of New Hampshire affirming the judgment of the Superior Court was

[1] Figures appearing in brackets herein refer to pages of the printed transcript of record.

entered on April 26, 1952. [66, 70] The judgment became final on June 3, 1952, when the motion for rehearing was denied. [71] The petition for appeal to this Court was allowed within 90 days after the judgment became final. [73-74] The appeal to this Court was timely allowed. [73-74] Probable jurisdiction was postponed by this Court on November 10, 1952. [78]

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Questions Presented

I.

Is the administration and enforcement of the ordinance by the City Council, requiring a permit for holding meetings in the parks of Portsmouth so as to deny all applications made by religious organizations to hold religious meetings and deliver religious talks in the parks of Portsmouth, an abridgment of freedom of speech, assembly and worship in violation of the First and Fourteenth Amendments to the United States Constitution?

How Question Raised

The trial court held that the denial of the application for a permit under the ordinance by the City Council of Portsmouth was arbitrary and unreasonable. [13]

It is an ambiguous holding as far as one aspect of the federal question is concerned.

This Court may assume that the trial judge meant that it was the duty of the City Council to issue the permit in view of the ordinance's being identical to the state statute in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508. He had before

him the language of the Supreme Court of New Hampshire in *State* v. *Derrickson* [5], where the certified questions in this case had been answered.

Finding that the denial of the permit was arbitrary may also have meant that there was an unconstitutional denial of the application by the City Council and, therefore, the enforcement of the ordinance by the City Council was in violation of the rights of appellant contrary to the First and Fourteenth Amendments to the United States Constitution.

Regardless of the ambiguity of the holding of the trial court there is none when consideration is given to the ruling of the court on the motion for judgment of acquittal. The motion specified three grounds, the last of which raised the federal question. [12] This motion was denied by the trial court and carried up to the Supreme Court of the state by proper bill of exception. [11, 13]

This exception presented to the Supreme Court of New Hampshire the question. It is whether the ordinance as enforced by the City Council, under its policy to refuse religious meetings in the park, was a violation of the federal Constitution. This was the same question presented to the Supreme Court of New Hampshire on the certified question on the first transfer of the case. See top of page 2 in the record in this case. [2] In that case the court stated the question to be "whether the city of Portsmouth can prohibit religious and church meetings in Goodwin Park on Sundays under a licensing system which treats all religious groups in the same manner". [5] The court said that it need not decide the question on the certified questions submitted because of the zoning of parks in Portsmouth. [4, 5, 6] This zoning theory was disproved. It did not exist as a fact. [39, 44, 46-47, 49, 50, 51, 52, 56]

When this question was again put to the court it was held that regardless of the action of the City Council, the appellant was guilty because he took the law into his own

hands by talking in the park and not applying for a writ of mandamus and waiting until such civil proceedings were completed. [61-66]

Should this question, evaded by the Supreme Court of New Hampshire, be passed on here; or, should it be remanded to the court below to determine? *Musser* v. *Utah*, 333 U.S. 95.

II.

Does the construction and application of the ordinance and the law of New Hampshire so as to require appellant to apply for a writ of mandamus or certiorari as the only remedies to correct the unconstitutional administration of the ordinance, and also so as to deny the defense in the criminal prosecution that the construction and application of the ordinance by the City Council was in violation of his rights guaranteed by the federal Constitution, amount to an abridgment of freedom of speech, assembly and worship contrary to the First and Fourteenth Amendments to the United States Constitution?

How Question Raised

The motion to dismiss and for a judgment of acquittal, under ground three, stated that if the law "was construed and applied so as to justify" a conviction "under the facts in this case" the rights of defendant "to freedom of assembly, freedom of speech and freedom of worship" would be denied contrary to "the First and Fourteenth Amendments" to the United States Constitution. [12] Denial of this motion presents the question stated above. [11, 13]

III.

Is the denial of the right to make a defense to the prosecution, charging a violation of the ordinance by failure to have a permit, a violation of the rights to procedural due process of law and a bill of pains and penalties in violation of Article I, Section 10 of, and the Fourteenth Amendment to, the Constitution of the United States?

How Question Raised

It is submitted that the mentioning of the Fourteenth Amendment in the motion to dismiss is sufficient to argue the denial of procedural due process in violation of the Fourteenth Amendment. [12] The motion was denied. [11] In the petition for rehearing under ground three the denial of procedural rights in violation of the Fourteenth Amendment was specifically assigned and the motion stated that the ground was "raised in the bill of exceptions". [67] Under ground four of the petition for rehearing the appellant for the first time raised the question that the construction of the ordinance in the criminal prosecution so as to deny appellant the right to challenge the validity of the administration of the ordinance by the City Council transformed the ordinance into a bill of attainder. [67-68] The petition for rehearing was denied. [71] Under assignment number two in the assignments of error in the petition for appeal this ground was brought forward along with the complaint against the denial of procedural due process that was properly raised in the motion to dismiss. [73]

IV.

Are the decisions of the courts below based on an adequate nonfederal ground to support the judgment of affirmance of the conviction?

Statute Involved

This case draws into question the validity of an ordinance of the City of Portsmouth, New Hampshire, Chapter 24, Article 7, which, among other things, reads as follows:

> Section 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the City Council.
>
> Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open-air public meeting.
>
> Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such licensee shall perform or exhibit or such parade, procession, or open-air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.
>
> Section 25. Penalty. Any person who violates section 22 of this Article shall be fined Twenty Dollars. [1, 9-10, 61-62]

A statute identical in terms to this ordinance was construed in a valid manner by the Supreme Court of New Hampshire in *State* v. *Cox*, 91 N. H. 137, affirmed in *Cox* v. *New Hampshire*, 312 U. S. 569. The court below in this case placed the same construction on Sections 22 and 24 of the ordinance above quoted. See the opinion of the court. [3] The court, however, did not determine whether this construction of the ordinance made invalid the unwritten policy of the City Council, which forbids the issuance of

any permit for religious meetings and talks to religious assemblies in the parks of Portsmouth.

The Supreme Court of New Hampshire, in answer to the certified questions, stated that the case presented a question of constitutionality of whether "the city of Portsmouth can prohibit religious and church meetings in Goodwin Park on Sundays under a licensing system which treats all religious groups in the same manner". [5] This question stated by the court was evaded by a false finding made to the effect that the city of Portsmouth had zoned its parks for religious meetings, allowing some such meetings in certain parks and forbiding them in others. [4, 5, 6] On an appeal in the criminal trial, the Supreme Court of New Hampshire again did not pass on the question but resorted to the proposition that the defense was forfeited because appellant defied the law and took it into his own hands by holding a meeting and giving the talk in the park without first going to the courts to get a writ of mandamus against the City Council. [61-66]

Constitutional Provisions Involved

The First Amendment, relied upon in this case, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

The pertinent parts of the Fourteenth Amendment which appellant relies upon read as follows:

> No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

NATURE AND HISTORY OF THE ACTION

This is a criminal case. [9] It is an appeal from a judgment affirming a judgment of conviction on an appeal trial *de novo* in the Superior Court. [10-11] The appellant was proceeded against in the Municipal Court of Portsmouth by complaint. [2, 15] He was charged with violating the ordinance in question on July 2, 1950. [10] A companion complaint was made against Derrickson, now deceased. [14][2] The pertinent part of the complaint charged that Poulos did "on a certain ground abutting a public street, to wit, Islington Street and upon certain ground abutting thereto known as Goodwin Park, did conduct an open-air public meeting without having first obtained a license from the City Council so to do". [10, 15]

The appellant pleaded not guilty in the Municipal Court. He was found guilty and fined. [10] He appealed to the Superior Court. [10-11] On the first hearing before the Superior Court of New Hampshire the case was reserved and at an earlier term transferred to the Supreme Court of New Hamshire for answer to certified questions. [1-7, 10, 61] The parties there stipulated the facts. [1-2] The Supreme Court of New Hampshire held that the ordinance was constitutional because the park was limited in its dedication and permissive use by the City of Portsmouth. [1-7] See 97 N. H. 91, 81 A. 2d 312.

[1] The case against him was discontinued and abated upon appeal from the conviction by the Supreme Court of New Hampshire. [62-63]

The case was tried in the Superior Court following the opinion of the Supreme Court of New Hampshire. [10-11] The appellant pleaded not guilty. [11] A jury trial was waived and the case was tried to the judge alone. [11, 15] At the close of the evidence a motion for judgment of acquittal was made. [11-12, 56-57]

The case was taken under advisement and on December 6, 1951, the court rendered a judgment convicting appellant. [12-13] A brief memorandum opinion stating the reasons was filed by the court. [12-13] The judge found that the application for the permit had been arbitrarily and capriciously refused. [13] But he convicted on the ground that it was the duty of appellant to resort to a civil action for mandamus and not defy the law and throw the controversy into the criminal courts. He held that by defiance of the law the appellant forfeited his right to make his defense of unconstitutionality of the enforcement of the law. [13] He convicted and fined appellant $20.00. [13] Appellant duly appealed to the Supreme Court of New Hampshire. [14]

The constitutional questions (except the bill of attainder question) were raised in a motion to dismiss filed in the Superior Court of New Hampshire. [12, 57] Each question presented in the trial court was considered and overruled in a written opinion. [13] Each holding of the trial court was presented on appeal to the Supreme Court of New Hampshire and duly assigned as error. [14] Each federal question presented upon this appeal also was presented to the Supreme Court of New Hampshire in the brief, on oral argument. The bill of attainder question was first presented by the motion for rehearing. [61-66, 67-70]

Facts

The appellant is a duly ordained minister of the gospel. He was assigned to serve Jehovah's witnesses in the city of Portsmouth, New Hampshire. [22] The congregation is a duly recognized group of Christian people. [22-23] The congregation is essentially evangelistic, composed primarily of missionaries engaged in door-to-door and street distribution of Bibles and Bible literature. [22]

In the spring of the year 1950 the congregation, acting through Derrickson, now deceased, and Poulos, made application to the City Council of the City of Portsmouth for a license to hold a public meeting in Goodwin Park, [35-36] A written petition was duly addressed to the City Council of Portsmouth and filed with the clerk. [2, 36] The appellant and Derrickson were informed that they could appear and speak in behalf of the petition before the City Council. [2, 36] The petition was placed on the agenda for hearing May 4, 1950. [2, 36] On that date Derrickson and Poulos appeared before the City Council, Derrickson doing the speaking in behalf of the congregation of Jehovah's witnesses. [2, 38-39] The congregation offered to pay any reasonable fee customarily paid for the use of the park as well as any expenses incurred by the city in permitting the holding of the requested meeting. [2, 36-37] The City Council was informed of the names of the Bible talks to be delivered and the date, time and place of the proposed assemblies in the park in question. [2, 23, 36-37] Derrickson showed that the talks related to an explanation of Bible prophecy, showing the cause of the suffering of mankind, the reason for the failure of the governments of this world to bring about a desired peace and the remedy for all the sufferings of mankind, as well as the failure of the governments to bring relief. It was pointed out to the City Council that the speeches were designed to prove that Almighty God Jehovah will set up a government of righteousness over the earth that will stand

forever and bring peace, prosperity, happiness and everlasting life to men of good will toward him. [2, 37-41]

The City Council was informed that the assemblies as well as the speeches proposed to be delivered in the park were to be open to all and that the public would be freely invited and none excluded. [41] The series of proposed lectures to the proposed assemblies in the park would show that the people are now living in the "last days" referred to in the Bible and that the great cataclysm of Armageddon is rapidly approaching, from which all honest people desire to find a way of safety and protection. [37-40] It was pointed out that the meetings came within the guarantee of freedom of assembly, freedom of speech and freedom of worship. [38] Derrickson read to the City Council excerpts from decisions of the Supreme Court of the United States. [38]

The petition was denied because the members of the council stated that they had never received a petition of a religious group to use the public parks, and that it was the policy not to permit any religious meetings in the park. [2, 39, 44, 46-47, 49, 50, 51, 52, 56]

Thereafter Jehovah's witnesses planned to hold their requested series of public meetings in Goodwin Park notwithstanding the refusal of the City Council to grant the petition for a license. [23, 39] They selected a spot in the park for assembling and the proposed talk was advertised. [23, 39]

Jehovah's witnesses planned to give a talk and hold a public meeting in Goodwin Park on Sunday, July 2, 1950. On this date Poulos was selected as the speaker. [23] At three o'clock on that afternoon Poulos made his appearance at the park together with a large number of other persons assembled therein to listen to him speak. [24] He had as title for his public speech "Preserving Godliness Amid World Delinquency". After being introduced he began his talk, which was orderly and without a disturbance. [23-

24] He spoke for about fifteen minutes. [25] He summarized what he said:

"I showed by chapter outline how the delinquency which is rampant upon the earth has come to its apex having been increasing by generations down through the ages even so very wicked at one time in the days of Noah that God saw fit to destroy that generation of people, and the purpose of that talk, what it has in store, is endeavoring to work out through a congregated lot of people today is to inform the people of the coming disaster, world disaster, the approach of the great cataclysm of Armageddon the Bible refers to it as a great day of God Almighty and it is absolutely necessary for people to take an intelligent stand in the light of truth and religion, to turn aside from the ways of the world and take our aid to people in this connection." [24]

At 3:15 Poulos was stopped by a police officer who asked him if he had a permit to hold an open-air meeting in the park and to give the talk. [25] Poulos answered that he did not have a permit because the City Council had denied the petition for a license and then added that he did not have a permit because it was not necessary. [25, 29] The officer informed him that he would have to stop speaking. [25, 29] Poulos informed the officer that he intended to continue. [25, 29] The officer told him that he would be arrested. Poulos continued. [25, 29] He was arrested and transported by automobile to the police headquarters where he was charged by warrant and complaint in the manner above recited. [25-26, 29]

Poulos testified that if he had been permitted to continue with the speech he would not have said anything that would have created a disturbance or annoyed other people in the park. [27] He outlined to the trial court the remainder of his talk thus:

"Well the subject itself, as I said in previous testimony, it dealt with this delinquent situation in the world, delinquency in every form which is to be found today, I guess

nobody will dispute that fact, and I would have told the people that from the, God's creation more or less such condition has been upon the world and it has been instilled in the men, men who do not listen, have no proclivity towards the words of Almighty God and they have been carrying on this campaign of delinquency and in order to oppose the works of Almighty God. I would have told them further that the purpose of that, that they allow these things to continue without interference is because He has a definite purpose to show. The bible shows that, ordinances of the bible, the bible shows God has foreseen about all this, that those who are in this part of the universe, because this is where delinquency first arose, and Almighty God, and try to sweep the world in delinquency, that we should not be perturbed unduly about these conditions because we know fully well we have God's word that he is going to cancel them out forever. The means he takes to do this, I would have further told them, the means he takes to do this is through the kingdom of heaven, we pray for that kingdom and the model prayer which we are instructed by Christ Jesus when he said, 'Our Father in heaven, hallowed be your name, your kingdom come', and I believe that and we want other people to believe it too because we know that is the means by which salvation and an end to all these disturbing conditions would come to an end but before this could be fully accomplished men from every walk and every avenue in life, men of all walks would have to come and pay their obeisance to the Almighty God." [26-27]

The stipulation of fact on the first transfer of the case to the Supreme Court of New Hampshire and the undisputed evidence on the trial of the case showed that there was no annoyance or disturbance in the park by that part

of the speech which was given. [2, 25] Also there was no interference of the use of the park by others established. The contrary was proved. [2, 25]

While there was evidence that no personal application was made by Poulos, there was a request for a permit to cover the giving of his talk by him made in the petition filed by Jehovah's witnesses. [27-28, 36-37]. Poulos said that he did not defy the law but went ahead in the good-faith belief that he had a right to speak without a permit because the application had been illegally denied. [28]

The testimony of the councilmen of Portsmouth was uniformly that the city did not have any ordinances or regulations whereby any one park was selected for the purpose of holding religious meetings. They all agreed that there was no type of zoning or selection of the parks for recreation purposes. They all testified that the policy was to deny all applications for permits for religious use on the ground that if they granted a permit for one they would have to give one to all religious organizations. It was admitted that they claimed discretion under the ordinance to refuse religious organizations the use of the parks. [39, 44, 46-47, 49, 50, 51, 52, 56]

This testimony of the officials directly contradicted the finding of the Supreme Court of New Hampshire on the reserved case answering the certified questions in advance of the trial in the Superior Court of New Hampshire. [4, 5, 6] 97 N.H. 91, 81 A. 2d 312. There in that opinion the court went out of the record and found a fact that was not in the record and one that did not exist according to the testimony of the councilmen and the clerk of council of the city of Portsmouth. [39-56]

Summary of Argument

I.

The administrative policy of the city of Portsmouth, in its enforcement of the legal regulatory ordinance concerning the use of its parks, which unwritten policy prohibits the giving of religious talks and the holding of religious meetings in the park, is an unconstitutional construction and application of the ordinance contrary to the federal Constitution. Such a policy abridges the rights of freedom of assembly, speech and worship guaranteed by the First Amendment to the Constitution.

History, from the dawn of its records, shows that the market places, the plazas, the public beaches and the public streets are used as places of public preaching. The common law recognized public preaching as one of the rights of assembly guaranteed by the common law. When the First Amendment was adopted it was intended to codify, as well as expand, the existing common law rights and liberties exercised in England, which included the right to street and park preaching. The modern practice in Columbus Circle in New York city and in thousands of other public parks throughout the United States shows that the guarantees of assembly and speech secures this right to preachers to speak to crowds gathered in the parks. *Kunz v. New York*, 340 U. S. 290.

A sophisticated stretching of the doctrine of separation of church and state so as to prohibit religious meetings in the parks should not be adopted by this Court, because it will erase history on park preaching. If it is, it will mean the beginning of the end for religious freedom in this country. It will spell godless disintegration of the religious institutions of the nations from the inside of its borders while the nation copes on its outside with dangers of assaults against this bastion of freedom of worship by irreligious police states of the world.

II.

The specious argument of expediency and the desire to maintain order by fashionable local appeal to the courts for writs of mandamus or certiorari as the only means to correct the unconstitutional denial of the applications for a permit to use the city park for purpose of assembly, is a specious theory rejected by the First Amendment. Such invention is an abridgment of the exercise of the civil liberties guaranteed by it and secured against state abridgment by the Fourteenth Amendment.

The common law liberty of speech included the right to speak publicly in any park on any subject without prior restraint. The First Amendment prohibited any abridgment of any liberties that can be exercised in a public park. Abridgment means not only prohibition and censorship but also means anything which shortens the exercise of the liberties or which burdens them.

The procedural doctrine of first applying to the courts to get compulsory process to permit the exercise of constitutional liberties is a plain, definite and certain abridgment or burden to freedom of speech and assembly. One burden upon such liberties by the judicial process is the tremendous expense of litigation. A much greater abridgment or curtailment of the liberties falls upon both the *broadcaster* as well as the *receiver* of ideas; disseminated by the exercise of freedom of speech and assembly. This is the burden of time.

The time-consuming delays in getting a final decision from the highest courts of the states or the nation would hobble and make ineffective freedom of speech and assembly in times of emergency or during political campaigns. All arbitrary officials in municipalities would have to do is to throw broadcasters of ideas into the judicial hopper, knowing that the writ will finally emerge at too late a date to help local *receivers* of ideas out of the clear and present

danger the *broadcaster* seeks to remove them from. Any practical-minded lawyer knows this.

The historic exercise of freedoms of speech, press and worship has been subject to only one judicial touch. That touch is light. It is never heavy or applied before the fact of use of the rights but (according to Blackstone and Cooley) after the fact of *abuse* of the use of the fundamental rights. It was never contemplated that the exercise of the rights should hinge on judicial writs regardless of how arbitrarily regulatory permits have been denied.

While considerations of expediency may well justify a rule which would force applicants for permits to operate a liquor store or a pool hall to first resort to the courts for writs of mandamus and certiorari before operating their businesses without a permit, these considerations are not sufficient to burden or shorten the liberties of speech and assembly guaranteed by the First Amendment. *Schneider* v. *New Jersey*, 308 U. S. 147 at page 161.

Freedoms guaranteed by the First and Fourteenth Amendments are *hair-trigger* weapons that can be resorted to on the spot by every citizen to defend the institutions of the country or of any group in the country. It is not necessary, before using the weapons protected by the First Amendment, to wait months for a final order approving the use of the rights to filter down to the lower level of the ordinary citizen from the judicial high command of a state or the nation. These rights are available to all persons to use, subject to only one judicial restraint. That is judicial reckoning for the abuse of the use of the rights. There is no prior judicial approval required.

III.

It does not require extensive statement to show that where a citizen is proceeded against, there he can defend. The right of self-defense carries with it the right to fight the aggressive assaults of an adversary in court, as well

as on the streets or elsewhere. In criminal actions to enforce violations of orders of administrative proceedings the question of constitutionality of the administrative order is open to question in defense to the prosecution. *Estep* v. *United States*, 327 U.S. 114. Due process of law requires this in proceedings in the state courts. *Hovey* v. *Elliott*, 167 U.S. 409, 413-418.

The appellant had a constitutional right to have the state courts consider whether or not the administrative enforcement of the law by the City Council of Portsmouth had violated his constitutional rights.

There is no question of failure to exhaust administrative remedies. There were no administrative remedies provided for in the ordinance. The remedies of mandamus and certiorari are judicial remedies and are not administrative remedies. Appellant was entitled to exercise his constitutional right without first resorting to a judicial remedy of the State of New Hampshire.

IV.

It is obvious that the state procedural problem is so intimately intertwined and so mixed up with the federal questions that it cannot be said to be substantial or adequate or sufficient enough to independently support the conviction and affirmance.

Argument

I.

The administration and enforcement of the ordinance by the City Council, requiring a permit for holding meetings in the parks of Portsmouth, so as to deny all applications made by religious organizations to hold religious meetings and deliver religious talks in the parks of Portsmouth, is an abridgment of freedom of speech, assembly and worship in violation of the First and Fourteenth Amendments to the United States Constitution.

Freedom to preach is not limited to preaching from the pulpit in some privately owned building. From time immemorial the right has been exercised on the streets, in the parks and by the seashore. It must be remembered that Jesus spoke to multitudes at the seaside. The apostles preached His gospel of the kingdom at the market place, as well as from door to door. They forsook no public avenue that was open to them to preach in an orderly and decent manner. Secular history abundantly attests the use of the public streets and the parks as appropriate places to preach. See Appendix to Appellant's Brief in *Fowler* v. *State of Rhode Island,* No. 340, October Term, 1952.

Since the Toleration Act in England religious preachers have been given in Anglo-Saxon and American municipalities the same right to make use of the streets and public parks as is accorded to every other speaker on any other speech.

The Salvation Army has for a long period of time, since its inception in fact, made use of the streets as a place to preach. The right of the Salvation Army to preach on the streets has never been questioned by the English and Scottish courts. *Beatty* v. *Gillbanks* (1882) 51 L.G.M.C. 117; 9 Q.B.D. 308. The only legal restraint that the common law has imposed upon street preaching is that it be not

abused. Lord Young, in *Deacin* v. *Milne* (1882) 5 Coup. 174, at page 184, said: "With regard to the Salvation Army, I think the magistrates of any town should observe a good natured abstinance from interference and continue in tolerance of them so long as there is no evil arising or to be reasonably apprehended." See *M'Ara* v. *Magistrates of Edinburgh* [1913] Session Cases 1059.

The First Amendment not only codified the existing liberty of speech and assembly in England at the time of its adoption but also intended to give the broadest liberty possible to even religious speakers at assemblies in public places on any subject. See *Bridges* v. *California*, 314 U. S. 252, at page 263.

Since its inception under the Constitution the people have been permitted to exercise the broadest liberty possible in an ordered society in connection with street and park preaching. Walk through Columbus Circle in New York city on any evening or at any other similar park in the large cities of the United States and street preachers will be found expounding their doctrines. See *Kunz* v. *New York*, 340 U. S. 290. While the exercise of this right is subject to regulation by the city as to time and place, it has never been doubted that a city has no authority whatever to completely deny all requests for permits for religious meetings under the guise of regulation. This Court has said that the exercise of these rights may not be abridged under the guise of regulation. See *Schneider* v. *New Jersey*, 308 U.S. 147, at page 160; *Cantwell* v. *Connecticut*, 310 U.S. 296, at page 304.

It is apparent that, in the light of history, religious speakers are entitled to make the same claim to the use of parks and streets as was recognized by this Court in its famous statement on the use of streets and public parks in *Hague* v. *C.I.O.*, 307 U. S. 496, at page 515, which was followed by a unanimous Court in *Jamison* v. *Texas*, 318

U. S. 413 at page 416. See also *Kunz* v. *New York*, 340 U. S. 290.

Since a law which absolutely forbids any sort of assembly at appropriate public places, such as a public park, is invalid, and inasmuch as religious speakers cannot be pushed away from their historic position at appropriate public places, it must be concluded that the policy of the city of Portsmouth not to permit religious talks and assemblies in its parks constitutes an unconstitutional construction and interpretation of the ordinance that brings it into conflict with the First and Fourteenth Amendments. This Court has held that the unwritten policy of a city which was enforced in an illegal manner was an abridgment of liberty guaranteed by the First and Fourteenth Amendments in a case similar to this. *Niemotko* v. *Maryland*, 340 U. S. 268 (1951). See also *Kunz* v. *New York*, 340 U. S. 290.

The invalidity of the construction of the ordinance placed upon it by the city of Portsmouth is fully demonstrated by the argument appearing in the brief filed in behalf of the appellant in the companion case of *Fowler* v. *Rhode Island*, No. 340, October Term, 1952. Reference is here made to that brief for further argument on the unconstitutionality of a state administration policy which forbids religious assemblies in the parks of a city. That argument is adopted here and made a part of this argument, as though copied at length herein.

When the case was certified by the Superior Court to the Supreme Court of New Hampshire the latter court sustained the validity of the enforcement of the ordinance on the theory that there was a policy of zoning the parks in Portsmouth for religious meetings. On a trial of the case this theory was disproved. It was proved never to exist. It did not exist at the time this case was tried, which was on the return of the answers to the certified questions to the Superior Court. The Superior Court did not expressly determine the constitutional question, although it was plain-

ly raised in the motion to dismiss. The Supreme Court of New Hampshire side-stepped the issue by concluding that since mandamus was the only remedy to urge, the defense stated in the motion to dismiss had been forfeited, and the constitutional question could not be passed upon in criminal proceedings.

Under all of the facts and circumstances, this question presented under this first point in this case ought to be passed on by this Court, notwithstanding the fact that it has been evaded by the New Hampshire courts. Ordinarily in a situation like this it would be proper to remand the case to the Supreme Court of New Hampshire to pass on this federal question. The question is being determined, however, in the companion case of *Fowler* v. *Rhode Island,* No. 340, October Term, 1952. Inasmuch as the Supreme Court of New Hampshire has evaded a determination of the question and has for over two years frustrated the efforts of the appellant to get relief, it would be timely and important for this Court to determine the question and set at rest the controversy. Thus, further litigation would be avoided, which will be needless in view of the fact that the Supreme Court of New Hampshire will be forced to follow the decision of this court in *Fowler* v. *Rhode Island,* No. 340, October Term, 1952, in event this Court in that case sustains the appellant's contention and holds that the ordinance in that case is unconstitutional.

Should this Court, however, not agree with the appellant on the propriety of determining this question in this case, the very least that should be done is to remand the case to the Supreme Court of New Hampshire with directions to finally face the issue, as this Court ordered in *Musser* v. *Utah,* 332 U. S. 95.

It is respectfully submitted that this Court should hold that the construction and application of the ordinance by the City Council of Portsmouth is in conflict with the First and Fourteenth Amendments. Otherwise the case should

be remanded to the Supreme Court of New Hampshire for a consideration of this point.

II.

The construction and application of the ordinance and the law of New Hampshire so as to require appellant to apply for a writ of mandamus or certiorari as the only remedies to correct the unconstitutional administration of the ordinance, and also so as to deny the defense in the criminal prosecution that the construction and application of the ordinance by the City Council was in violation of his rights guaranteed by the federal Constitution, amounts to an abridgment of freedom of speech, assembly and worship contrary to the First and Fourteenth Amendments to the United States Constitution.

The contention of the appellant is that the decisions of the courts below, holding that he should have resorted to mandamus or certiorari and not exercised his constitutional rights without approval of the courts and that he forfeited his rights in the criminal trial by taking the law into his own hands, is an abridgment of rights guaranteed to him by the First and Fourteenth Amendments. While appellant does not contend that he has been absolutely denied constitutional rights by the face of the ordinance, the fact of the matter is that the enforcement of it by the city of Portsmouth, did prohibit him from exercising his rights guaranteed by the First Amendment.

Inasmuch as the Superior Court of New Hampshire has held that this policy is unreasonable and since both of the courts below have denied appellant the right to challenge the validity of the ordinance in these proceedings, appellant takes the position that the judicial interpretation of the ordinance so as to deny him his rights also constitutes an abridgment of his liberties.

When the administrative action of the City Council in prohibiting the use of the park is combined and integrated

with the judicial action of the state or the evasion of the constitutional question by the courts, there is a joint absolute state denial of liberties guaranteed by the First Amendment. The concerted state action by the administrative officials of Portsmouth and the judicial officials of New Hampshire constitutes a violation of the rights guaranteed by the First and Fourteenth Amendments.

Taken separately or disintegrated, the prohibition (so as to isolate the rulings of the courts forfeiting the right to make the defense) must be, nevertheless, concluded to be a violation of the rights guaranteed by the First and Fourteenth Amendments.

It may be said, for purpose of argument, not to be absolute prohibition or prior censorship to first go to the courts before exercising liberties guaranteed by the First Amendment. It nevertheless remains an inescapable fact that forcing appellant to run the judicial gauntlet of New Hampshire, before he can exercise liberties guaranteed by the First and Fourteenth Amendments, constitutes a wanton abridgment or burdening of his liberties. It should be remembered that the Constitution is not confined to proscribe censorship and prohibition. It also prevents *abridgments* or *burdens* upon the exercise of such liberties.

Considerations of the practical consequences of forcing a citizen to hire a lawyer and run the judicial gamut and engage in long litigation before all the judges of the state, as a condition precedent to exercising rights guaranteed by the Constitution, leads the pragmatical and judicial mind to the inevitable conclusion that is is an abridgment of liberty guaranteed by the First and Fourteenth Amendments.

The very nature of freedom of speech and assembly implies *hair-trigger* exercise of rights in time of emergency, peril or during election campaigns. If these fundamental personal rights, so vital to the maintenance of

democratic institutions, are to be bogged down by the niceities of procedural technicalities of state remedies of mandamus and certiorari and slowed up by high-priced lawyers and long, involved and complicated opinions of the judges, they will be of little, if any, value to the people, regardless of the type of ordinance involved. Whether the ordinance is purely regulatory and constitutional on its face and as construed by the judges, the facts remain that the citizen ought not to be forced to go to the judges for judicial review of arbitrary administrative action as a condition precedent to the exercise of liberties guaranteed by the First and Fourteenth Amendments.

The common law under the Stuart kings required censorship of ideas or prior judicial review of speech by the Stuart judges. When the censorship law was done away with judicial review by judges, as well as by the king's censor, as a condition precedent to speech, was completely abolished. The common man then, under the common law, was required to come before judges only for the abuse of the use of his right or after the exercise of the right. *De Jonge* v. *Oregon,* 299 U. S. 353 at page 364-365, which is presently the constitutional law of the United States. This shows that freedom guaranteed by the First Amendment precludes prior judicial review.

Since a man may not now be called upon to make an appearance before the king before he speaks, why should he be called upon to appear before judges and prove he has a right to say what he intends to say, which the judges know is guaranteed by the law of the land before they hear him? How ridiculous! This is especially true where all administrative regulative power has been exhausted, as here, by properly applying for a permit. Such alien theory, if grafted onto the law of speech and assembly in the United States, would plunge us back into the dark judicial pit of the Stuart judges and Star Chamber censorship of ideas.

This Court has indicated that previous restraint of any

kind is an infringement of freedom of expression guaranteed by the First Amendment. See *Near* v. *Minnesota*, 283 U. S. 697, at page 716. In the recent case of *Burstyn, Inc.* v. *Wilson*, 341 U. S. 329, the Court said that the *Near* decision "recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection".

The issues in this case were made under the Constitution of the United States as of the date that the appellant attempted to exercise his liberties in the park. Up to that date his federal constitutional rights had been violated by the administrative determination of the state government. The City Council had unconstitutionally construed their discretionary powers under this regulatory ordinance and reached the conclusion that they could prohibit religious assemblies in the park. This administrative determination, and the subsequent exercise of the rights guaranteed by the Constitution in Goodwin Park by the appellant, framed the questions to be determined under the federal Constitution.

When the case first reached the Superior Court that court was undecided as to the constitutionality of this administrative construction of the ordinance. It transferred the matter to the Supreme Court of New Hampshire for answers to certified questions. That court did not say whether the policy of the city in denying all religious meetings in the parks of Portsmouth violated the Constitution. The question presented to it was evaded by a ruse. This was later proved to be without foundation in fact. At the trial of the case the Superior Court then evaded the issue of the constitutionality and resorted to a forfeiture of appellant's rights on the theory that he had violated the rules of judicial etiquette, defied the law of New Hampshire and that he had taken the law into his own hands by exercising

rights guaranteed to him under the First and Fourteenth Amendments!

While the ordinance properly interpreted and construed by the New Hampshire courts brought it within the decision in the *Cox* case (91 N. H. 137, affirmed 312 U. S. 569), the fact is that the construction and application of the ordinance by the City Council constituted a deprivation of appellant's liberties. It is this construction and application of the ordinance, made by the administrative branch of the state government, that appellant complains of here. It is that which he sought to raise and get determined in the state courts, but he failed.

Even though the ordinance may be said to be regulatory on its face, it has been administered in an unconstitutional manner. This made it unnecessary for the appellant to appeal to the judicial arm of the state government as a condition precedent to exercising liberties guaranteed by the First and Fourteenth Amendments.

Let us now turn to some of the practical consequences of adopting this new theory in federal constitutional law invented by the New Hampshire courts, as a basis for putting people of that state in the bastille who dare to courageously exercise the liberties guaranteed by the First and Fourteenth Amendments to the United States Constitution.

This state policy seems to be contrary to the common law policy of England and Australia, which is the lowest standard that the Fourteenth Amendment permits. It shows that citizens who are willing to submit to hardship and possible imprisonment as they fight for their constitutional rights against the encroachment of the executive are performing a vital public function. They are protecting the rights of all the citizens.

In the Australian case of Ex parte *Sinderbury* [1944] S.R. 263 at 270, Chief Justice Jordan speaks with approval of those prepared to stand for their rights against the full

power of the Crown that ordinary citizens are afforded " . . . no means of knowing whether any particular direction was legitimate or a piece of gratuitous executive or bureaucratic despotism. An occasional Hampden might be found with courage enough and money enough to face the risks of imprisonment for an indefinite term and a fine of any amount and able and willing to fight an instance of unlawful dictation up to the High Court, but the ordinary citizen would have no real alternative to submitting to any order that might be given him". See also *Dyson* v. *Attorney General* [1911] 1 K.B. 410.

The Hampdens who are prepared to stand for their rights and to contend against governmental lawlessness, whether executive or judicial, fulfill an important public service. If they did not have the courage to raise the issues by disputing the actions of the officials, then official lawlessness could continue unchecked and often beyond the reach of the courts. This Court should be glad to see these issues come up, in the manner that appellant raises them here, for determination that all may know what the law is, and abide by it. The effort to deny judicial determination of the fundamental constitutional question because the appellant has had the courage to stand foursquare on the federal Constitution should be immediately rejected by the Court.

In fighting for their liberties, the way they are, Jehovah's witnesses are building a buttress of protection for the rights of all the American people. This warfare on behalf of elementary liberties has not been waged by this minority group without a terrific toll in human suffering, abuse, financial drain and heartache. Cold statistics of cases fought do not tell the whole story of this modern inquisition.

In battling for their legal rights (and, incidentally, for all the people) Jehovah's witnesses in the United States have helped this Court grow the flesh of practical appli-

cation onto the bare skeleton of the freedom-of-worship provision of the First Amendment to the Constitution. The immense public benefit resulting from the work of this small group has been recognized. Mr. Justice Murphy remarked in *Prince* v. *Massachusetts*, 321 U. S. 158:

" . . . Jehovah's witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little-used ordinances and statutes. See Mulder and Comisky, 'Jehovah's witnesses Mold Constitutional Law', 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom." (321 U. S. at pages 175-176)

It is Portsmouth and the State of New Hampshire who are defying the fundamental law stated in the federal Constitution by seeking to do what they have no legal authority to do. The mere fact that they are both official bodies—executive and judicial—does not make their every action lawful. When they seek to exceed their jurisdiction in defiance of the Constitution that they agreed to support, the sovereign citizen has both a right and a public duty to call their hand and to ask from this Court a judicial determination of whether or not their actions are constitutional.

This Court and all parties should be glad that the constitutional questions are here raised in these criminal proceedings so there may be a proper determination of the issues. The citizen who raises this issue is doing an important public service, and must not be driven from the judgment seat by specious arguments of the State of New

Hampshire. Appellant is prepared to abide by the fundamental law as set out in the Constitution of the United States. All he asks is that the appellee be forced to abide by the same document through "equal justice under law".

The principle laid down by the court below burdening the exercise of the right to hold a meeting and give a speech in a park with heavy expense and tiresome wait for a final decision in a mandamus action violates the guaranties of free assembly and free speech guaranteed by the First Amendment.

As long as the would-be speaker is obliged to go to the City Council, to wait a week or more upon the Council, or sit by until some busy administrator considers a speech that he wishes to make or his request to hold an assembly, to wait until the latter has time to determine if a meeting can be or cannot be held, and then wait until a trial in the Superior Court and appeal to the Supreme Court of New Hampshire to get a legal opinion upon the issue; then he has been forced to wait a year and is denied the free exercise of his liberties.

Will the writ of mandamus restore the time lost? Suppose a preacher or politician were traveling through the State making a peripatetic tour speaking on his doctrines but, instead of being at liberty to start speaking in each town, he would first be obliged to deal with the local police and appeal civil proceedings and wait for the judges to act at their convenience or pleasure. Would he be free to exercise his right to preach, to lay his oral opinions before the public? Obviously not!

For such an activity, liberty would be effectively destroyed, even if in each town the courts were to force the giving of the permit. By the time the traveler waited for a decision in each place, he may as well surrender his constitutional rights to the 'village tyrants' and give up the thought of reaching the people in this manner. See *West Virginia State Board of Education* v. *Barnette*, 319 U. S.

624, at p. 638. Dissemination of information would be effectively hamstrung, strangled and killed in New Hampshire.

How can appellant be asked to spend time and money asking for a mandamus directed to officials who have defied the Constitution? Before being required to take such an empty procedure, appellant is entitled to have his preliminary question answered: Is this ordinance valid as construed and applied? The basic invalidity of the application and construction of the law immediately ousts the argument that a mandamus must first be sought.

Even assuming that mandamus would lie, it still does not alter the fact that this ordinance as enforced is not only an infringement, it is, moreover, the means of destroying the freedom of assembly and speech from every practical standpoint. Suppose one desires to hold a certain assembly to criticize one of the parties to an election to be held one week hence. The council may refuse to grant the permit. By the time the would-be speaker can get through the courts two or three years may have gone past. Perhaps he has spent all his money getting prepared for the assembly in the first place and does not have the few thousand dollars to spend in litigation; so the right to a free assembly for the poor is entirely abrogated. What the citizen may have to say may be of real value; yet he is prevented from speaking in time to help.

Let us assume that one is a poor man with some very important political submission to make to the people. Possibly he has found some great corruption in the police department, the city council or on the part of some other official who is supported and abetted by the city council. The reformer often finds his cause unpopular; one can almost say that the more need there is for a reformation, the greater is the possibility that there will be somewhere a powerful vested interest in the present corruption.

And so the sovereign citizen in all sincerity spends

money getting ready to expose these disturbing facts that he has ascertained. He is told: "Yes, there is free assembly in this county. You may freely state your opinions; but before you can speak or assemble one minute, you must be prepared to take a mandamus against the city council, which, before it is finished, will most probably cost thousands of dollars." For the rich man this may not be an insuperable obstacle. For the great proportion of the citizens such a view of the law amounts, from a practical standpoint, to a complete prohibition. It is not only the rights of the wealthy and powerful political organizations that must be maintained. The law is no respector of persons. The Court is just as much concerned with the liberty of the average citizen and the contribution that he can make to the welfare of the nation. The sovereign people are entitled to have their rights protected and not after overcoming the hurdle of huge and disproportionate legal expenses in time-consuming mandamus proceedings that amount to clear abridgment.

Quite apart from the previously mentioned destroying financial burden of such litigation is the time factor required for the seeking of judicial review of the refusal of the permit. The speaker who wishes to comment upon an election to be held one month hence would not receive much comfort from the assurance that he is entitled to go to court and carry through a couple of appeals before being entitled to present his thoughts to the people. Even suppose he won the case; how much better off would he be with the knowledge that he now has a right to speak and assemble to deal with the outcome of an election that is already a year or two past? This whole argument of the court below makes a farce of the democratic process and totally removes the practical value of liberty of expression.

In times of emergency it is often essential that it be possible to move quickly and immediately to make information known to the people. There are times when the pub-

lic officials are not too anxious to move on a problem or are afraid to move. Freedom of the people to agitate for changes may result in something's being done before it is too late.

Witness the situation in France during World War II: the country was riddled with fifth columnists, often in high places. It can happen here! If public spirited citizens were at liberty to address the populace, it might be possible to cut out and throw away corruption in office about which much was only recently said in election talks or to remove unfaithful officials before it becomes too late.

If, however, each of them—the local official or the mandamus judge—is able to stand athwart the channels of communication, he could prevent the information from reaching the sovereign people before it was too late. In time of invasion, insurrection, corruption in office, pestilence or other serious emergency, it is often essential that the populace have available speedily independent views on the situation separate and apart from the inertia of officialdom, executive or judicial.

On the view of the law taken by the New Hampshire Supreme Court and the demand that the officials be permitted to deny the permit, subject only to judicial review by mandamus, the value of a free assembly and free speech, from the standpoint of a vital, healthy federally protected weapon, ready for emergencies as something which is open to use by all people, rich and poor alike, would be lost by smothering and burying it in the judicial archives developed or words produced under the procedural law of mandamus and certiorari in New Hampshire.

It is plain, therefore, that compelling a person to resort to the expensive and long legal procedures, forcing the enlistment of the services of expensive lawyers, and running the risk of misinformed judges, in order to correct an abuse of discretion and unconstitutional enforcement of a legal ordinance by city or state administrative officials

is to impose a much too heavy burden or abridgment upon freedom of speech and assembly. The Constitution did not limit the prohibition on burdens and abridgments. It precludes judicial-word burdens and abridgments as a condition precedent to the exercise of these freedoms as much as it proscribes burdens and abridgments by legislative and administrative officials. See *Shelley* v. *Kraemer*, 334 U. S. 1.

The very fact that this case has been pending in the courts of New Hampshire since July, 1950, without having a final determination as to the constitutionality of the administrative construction of this ordinance is proof conclusive that the long delay and tremendous expense will inevitably destroy the First Amendment if every person desiring to exercise his liberties guaranteed by it is forced to appeal to the courts through expensive lawyers and costly judicial proceedings as a condition precedent to the exercise of his civil liberties.

The foregoing considerations and arguments demonstrate that the ruling that was laid down by this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296 should here apply. While there the ordinance was not held to be void on its face, it was decided by this Court that, as construed and applied to the facts by the Connecticut courts, the administrative officials burdened freedoms guaranteed by the First Amendment. The Court in that case rejected the argument that Cantwell should have resorted to the civil process of mandamus as a condition precedent to exercising liberties guaranteed by the First and Fourteenth Amendments. It was pointed out in support of the adverse judgment by the Connecticut court that this procedure was open to the appellants in that case to correct the unconstitutional denial of the permit. See the language of this Court in 310 U. S. at pages 305-307.

The holding of the court below, when it is considered that mandamus at any price or at any time is a condition

precedent to the exercise of liberties guaranteed by the First and Fourteenth Amendments, is a burden and an abridgment although not a prohibition conflicting directly with the holding of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, 305-307.

The court below attempted to evade the obligations imposed by the *Cantwell* holding. The court said: "It must be noted, however, that in that case the entire licensing statute was held invalid as it was applied to persons engaged in distributing literature purporting to be religious and soliciting contributions to be used for the publication of such literature. The situation is different from that . . . where the entire statute is not rendered invalid, so that convictions may be had under valid portions."

The court below misapprehended the effect of the holding of this Court in the *Cantwell* case. While the Court said that the statute in *Cantwell* was *invalid as applied* it discloses the belief that certain parts of the statute were held void on its face. This Court held no part of the statute void on its face; the holding of this Court was merely that, as construed and applied to the facts of the case, it was unconstitutional under the First Amendment.

Appellant here made the identical contention that was made in the *Cantwell* case. It is that the ordinance, as construed and applied by the administrative officials at Portsmouth, is an abridgment of liberties guaranteed by the First Amendment. The courts below admit the correctness of this contention, but hurl back upon the appellant their incompetency to determine the question in these proceedings. It is submitted that the present case is not distinguishable from the *Cantwell* case.

The holding of the court below, denying appellant the right to raise his constitutional objections in defense to the prosecution is in direct conflict with *Royall* v. *Virginia*, 116 U. S. 572, 582-584. In that case the licensing tax law was held to be constitutional on its face. As the basis for

the denial of the license the administrative official relied on an unconstitutional statute. The same type of holding was made by the Virginia court in that case as was made by the court below in this case. In this case, like the *Royall* case, there is a valid law. In this case, like the *Royall* case, there is an arbitrary and capricious denial based on unconstitutional concepts of the law. In the *Royall* case there was a valid statute unconstitutionally construed and applied. In this case there is a valid ordinance unconstitutionally applied. The defendant in the *Royall* case was denied a constitutional right under a valid statute and penalized by having his constitutional defense taken away from him. In this case the court below has forfeited the federally guaranteed constitutional rights and denied appellant the right to make his defense based on the federal Constitution in the same way that the Virginia court denied Royall his rights. In the *Royall* case the Court said:

> In the present case the plaintiff in error has been prevented from obtaining a license to practice his profession in violation of his rights under the Constitution of the United States. To punish him for practicing it without a license thus withheld is equally a denial of his rights under the Constitution of the United States, and the law, under the authority of which this is attempted, must on that account and in this case be regarded as null and void. (116 U. S. at page 583)

While there is no law of New Hampshire or of Portsmouth which commanded the unconstitutional denial of the permit in this case there was an unwritten policy of the City Council that required it. [17, 46, 47, 52] An invalid unwritten policy relied upon by a City Council is as much within the reach of the Constitution as is a written law to the same effect. *Niemotko* v. *Maryland,* 340 U. S. 268,

at pages 271-272. The unwritten unconstitutional policy in this case gives no stronger support to the decision of the court below than does the written law in the case of *Royall* v. *Virginia*, 116 U. S. 572, at page 583. It is submitted that there is also a direct conflict between the decision of the court below and the holding of this Court in the *Royall* case.

The tergiversation of the New Hampshire Supreme Court in this case alone ought to be sufficient grounds for reversing the judgment of conviction. On the same set of facts disclosed in the record in this case, except for the testimony of the councilmen denying the statements made by the Supreme Court of New Hampshire in its first opinion answering certified questions, the court sustained the validity of the law. It considered the defense of unconstitutionality raised by the appellant in the answer to the certified question. See *State* v. *Derrickson*, 97 N. H. 91, 81 A. 2d 312. When it was confronted with the inescapable duty of passing on the constitutionality of the administrative action by the Portsmouth City Council on the appeal in this case, it chose to elude the duty imposed on it by the First and Fourteenth Amendments by resurrecting and wrongly applying the doctrine of *State* v. *Stevens*, 78 N. H. 268, at page 270. This hedgehopping of sacred constitutional rights of the people of the United States by the Supreme Court of New Hampshire produces a fremendously large area of uncertainty in the field of constitutional law which ought to be extirpated by this Court.

This Court has held that whether a law is valid or invalid under the Constitution "depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another". (*Concordia Fire Ins. Co.* v. *Illinois*, 292 U.S. 535, at page 545) The New Hampshire Supreme Court has, to the contrary, erroneously concluded that this Court has limited the collateral attack against administrative determinations

in civil liberties cases to situations where the ordinance providing for the administrative action is void on its face. See this Court's discussion in the opinion about the holding in *Hague* v. *C. I. O.*, 307 U. S. 496. See also the opinion of the Court of Appeals in *Hague* v. *C. I. O.*, 101 F. 2d 774.

The holding of the court below is that if the laws are constitutional as written by the legislature but are unconstitutional, as enforced, construed and applied by the administrative agency, such attack is made collaterally and is one that cannot be considered except in certiorari proceedings brought directly to review.

This position is patently wrong as far as the federally secured liberties of assembly, speech and worship are concerned. This Court has never made a distinction between the unconstitutionality of a statute written by the legislature of a state invalidly upon its face and because of invalidity as enforced, construed and applied by the administrative departments of the state government. In fact, this Court has repeatedly considered collateral attacks against administrative determinations that constitute unconstitutional enforcement, construction and application of legislative enactments.

In *Yick Wo* v. *Hopkins*, 118 U.S. 356, it was held that the ordinance providing for the issuance of the permit was perfectly valid as written. The attack was collateral and identical to that made in this case against the ordinance. It was asserted that the ordinance was invalid as enforced, construed and applied by the administrative officers. This Court considered the contention made collaterally against the administrative determination in habeas corpus proceedings brought to review the conviction in a criminal case. This Court has repeatedly considered and held invalid under the federal Constitution perfectly valid laws as written. The application of the laws was held to be arbitrary, capricious and unconstitutional. The enforcement of them was held to be invalid. See *Greene* v. *Louisville &*

Interurban R. Co., 244 U.S. 499, 506-508; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 20; *Louisville & Nashville R. Co.* v. *Greene*, 244 U.S. 522, 527, 528, 530, 531; *Sterling* v. *Constantin*, 287 U.S. 378, 393; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426, 434.

The decision forces piecemeal litigation. If a person contends that an ordinance is void on its face his remedy is to refuse to comply with it and defend in a prosecution. If the ordinance is said to be invalid as enforced, construed and applied, the only remedy is mandamus or certiorari. Now, is not this an anomalous situation? Does not this make a farce out of litigation? Does it not produce a multiplicity of suits? Does it not split causes of action and grounds of defense? Does it not put a judicial burden and impediment upon the people of the state seeking to exercise their civil liberties?

What could a lawyer do for a client who contends that a law is both unconsititutional on its face and as construed and applied? He, in fairness, ought to be able to make both contentions in one proceeding. The court below, however, has artificially inseminated the law and produced an innovation that forces the lawyer to divide his litigation like an amoeba. Litigation is like the atom; it is dangerous to split. The Supreme Court of New Hampshire has, alas, performed a miracle. It is submitted that this is not the function of temporal powers, judicial though they may be.

The court below, in attempting to elude *Estep* v. *United States*, 327 U.S. 114, and *Gibson* v. *United States*, 329 U.S. 338, has skated onto thin ice. In simulating a distinction of this case from those two cases, the court below states two grounds. First it says that "Poulos has not exhausted his administrative remedies because of his failure to resort to civil proceedings against the city council"; then it declares that "it was essential for the government to show valid orders of the local boards before it could convict for failure to comply with those orders". This statement follows

the observation that it "was not necessary for the State to show the rightful denial of the license". [66]

What is the *administrative* remedy that was available to Poulos? Is there a remedy provided in the ordinance? A search shows none. Is there a statutory remedy for review of contentions that a denial of a permit constitutes an unconstitutional enforcement, construction and application of an ordinance? There is no such statutory administrative remedy on the statute books of New Hampshire.

It is indeed a new theory to say that a judicial remedy is an administrative remedy. It has been universally held by the courts, state and federal, that administrative remedies do not include judicial remedies. The remedies of mandamus and certiorari have been held to be judicial remedies and not administrative remedies. The courts have all (except one) held that it was not necessary to resort to one particular judicial remedy to review an administrative determination, unconstitutionally construing and applying a law, before being entitled to make a defense in a criminal proceeding or a collateral attack in an injunction proceeding. See *Lane* v. *Wilson*, 307 U.S. 268; *Railroad & W. Comm'n of Minnesota* v. *Duluth St. Ry.*, 273 U.S. 625. The court below in its opinion stands alone and ignores the principle of those decisions.

The statement that the Government in draft prosecutions is required affirmatively to prove the validity of the order is not true according to federal criminal procedure. The court below says that the Government in draft prosecutions must negative the invalidity of the draft board order. This has never been the holding of any of the federal courts.

The court below says that all that need be done in a case where a person holds a meeting after there has been a denial of the permit is to show merely that there has been a denial and the holding of the meeting. In federal draft prosecutions the burden is no greater. All the Govern-

ment has to do in those prosecutions is to show the registration, the classification, the acceptance, the order to report for induction and the refusal to comply therewith, and the case is made out. It is incumbent upon the defendant to point out the invalidity of the order in defense. The appellant sought to do this in the court below. The court, for reasons held invalid in the *Estep* and *Gibson* cases, *supra,* refused to consider the defense that the ordinance was unconstitutional. How it distinguishes the *Estep* and *Gibson* decisions according to the true judicial process does not appear. No distinction can be made. The holdings in those cases also control here.

The point made here is demonstrated and supported by the tax assessment cases in New York State. The exclusive remedy prescribed for review of arbitrary and capricious fact and law determinations by tax assessors is certiorari. See Article 13 of the Tax Law of New York. Where the assessors, however, impose taxes upon property exempted by the Constitution and statute, the New York courts recognize that a legal attack can be made collaterally in an action to remove a cloud from the title of the property on the theory that this is an illegal and unconstitutional administrative enforcement of the tax law. See *Elmhurst Fire Co.* v. *City of New York;* 213 N.Y. 87; *People* ex rel. *Erie Railroad Co.* v. *State Tax Commission,* 246 N.Y. 322.

It is respectfully submitted that the construction and application of the ordinance and the law of New Hampshire so as to require the appellant to bring a mandamus action or certiorari proceedings in order to preserve his constitutional rights, and forfeit his rights to a defense in a criminal proceeding brought to enforce the administrative order denying the permit violate the rights of freedom of speech, assembly and worship, contrary to the First and Fourteenth Amendments to the United States Constitution.

III.

The denial of the right to make a defense to the prosecution, charging a violation of the ordinance by failure to have a permit, is a violation of the rights to procedural due process of law and a bill of pains and penalties in violation of Article I, Section 10 of, and the Fourteenth Amendment to, the Constitution of the United States.

The denial of a defense in this criminal proceeding because the appellant has not sought a writ of mandamus or certiorari to review an administrative order made the basis of the prosecution is a violation of the Fourteenth Amendment. Reference is again made to *Royall* v. *Virginia,* 116 U.S. 572, where this Court said: "To punish him for practicing it without a license thus withheld is equally a denial of his rights under the Constitution of the United States. . . ." (116 U.S. 583) See also *Thornhill* v. *Alabama,* 310 U.S. 88, at pages 95-98, and cases cited.

In *McVeigh* v. *United States,* 11 Wall. 259, 267, the Court said that due process of law required that when one is assailed by an indictment or proceeding in the United States District Courts, "he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

The doctrine of denial of defenses because of contempt of the law and flouting the orders of administrative and judicial officers has never been approved even in the state court proceedings. In *Hovey* v. *Elliott,* 167 U.S. 409, 413, 414-415, 417-418, this Court reversed a judgment where the answer of the defendant had been stricken because of contempt of court. The Court held that the entry of judgment by a state court without affording an opportunity to defend was a violation of the citizen's rights of due proc-

ess. The right to attack any administrative order on the ground of its illegality, in defense to an indictment, is supported by *Windsor* v. *McVeigh*, 93 U.S. 274, 277-278.

In instances where this precise question has been taken before the appellate courts of some of the other states, it has been held that one proceeded against in a criminal prosecution may show in defense thereto that the administrative determination was illegal, in excess of authority conferred by the statute, arbitrary and capricious, or contrary to the undisputed evidence. *People* v. *McCoy*, 125 Ill. 289, 17 N.E. 786; *Fire Department of City of New York* v. *Gilmour*, 149 N.Y. 453, 44 N.E. 177; *State* v. *Rachshowski*, 86 Conn. 677; *People* v. *Kaye*, 212 N.Y. 407, 416; *State* v. *Weimar*, 64 Iowa 243; *State* v. *Kirby*, 120 Iowa 26; *Crane* v. *State*, 5 Okla. Cr. 560; *Richter* v. *State*, 16 Wyo. 437; *Stevens* v. *Casey*, 238 Mass. 368, 117 N.E. 599.

There is no reasonable basis for the denial of the right to be heard in defense to the prosecution. How is the State to be hurt by allowing one charged with speaking in a park without a license permit properly applied for to challenge the constitutionality of the denial? Ultimately it is the same court that decides the matter whether it is by mandamus, certiorari or criminal proceedings. The powers of the criminal court are as broad as the powers of the civil court. It seems under the federal Constitution to be highly unreasonable and hypertechnical to gag the judge of the criminal court and by a violation of due process of law forbid him from doing justice. The present case is a typical example of the absurdity of the procedure established. In this case the court heard the evidence as extensively as it could have been received in a mandamus or certiorari proceeding. Yet the doctrine of *State* v. *Stevens*, 78 N.H. 268, has blinded the court below to justice. What good comes to the procedure of New Hampshire by forcing this conclusion? The burden on the courts is no different whether it be by

criminal proceedings or by civil that the invalidity of the denial is considered.

The reasons against the doctrine of the *Stevens* case are much stronger. The welfare of the people is served best by granting a hearing in a criminal case brought to enforce the order of the administrative agency where there has been no civil review. The citizen is entitled to his day in court, especially in criminal proceedings. It brings criminal proceedings and the courts into disrepute to deny the right of self-defense, which is accorded even by the barbarians. Through niceties and the doctrine of convenience the court below has denied just that—appellant's right to self-defense, guaranteed by due process of law.

Such doctrine sets a trap for the unwary. The citizen who attempts to exercise his civil liberties falls through the trap door of the doctrine of *State* v. *Stevens,* 78 N.H. 268. While attempting to hold secure his rights, he finds that a gin is set for him by the Supreme Court of New Hampshire in the *Stevens* case, *supra.* It is penalizing to ordinary citizens desiring to have their say on important matters of public interest, many of whom are ignorant of the procedural niceties and technicalities of criminal procedure, to catch them unawares in the insidious *Stevens* doctrine. What does the State profit by such rule? How is the State injured by allowing a defense?

It is respectfully submitted that the holding in this case has denied the appellant his procedural rights in criminal cases guaranteed by the Fourteenth Amendment. For this reason alone the judgment should be reversed.

The holding of the court below in this case so as to follow *State* v. *Stevens,* 78 N.H. 268, ought to be reversed and the decision in that case set aside because the law of New Hampshire has been construed in such a manner as to deny a judicial trial, thereby converting the law into a bill of attainder, contrary to the provisions of Clause 1, Section 10, Article I of the United States Constitution.

This point was not raised in the trial court. It was not raised in the Supreme Court of New Hampshire until the motion for rehearing was filed. In that motion it was explicitly raised. It is the belief of appellant that, although if belatedly raised, it was considered and determined by the Supreme Court of New Hampshire on the denial of the motion for rehearing.

While this particular point was not raised in the bill of exceptions in the Supreme Court that was brought up from the trial court, this failure does not bar the consideration of it here because it was timely presented in the petition for rehearing.

The refusal to consider the unconstitutionality of the ordinance, as construed and applied in this criminal case, was a surprise and a reversal of the action of the Supreme Court of New Hampshire in *State* v. *Cox*, 91 N. H. 137, where the identical question was raised, whether the ordinance was valid, as construed and applied. See the question presented in *Cox* v. *New Hampshire*, 312 U. S. 569.

It is true that *State* v. *Stevens*, 78 N. H. 268, stood in the books of decisions of the court, yet it was not believed to be applicable in view of the later decision in *State* v. *Cox*, 91 N. H. 137. Under these circumstances, while this point of law was not urged in the Supreme Court of New Hampshire earlier, it was time enough to raise the question here in view of the holding of this Court in *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677-678. See also *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366-367.

The denial of the petition for rehearing, without a discussion of the question, was sufficient in view of the reversal of the position taken by the New Hampshire Supreme Court in the *Cox* case. *Ohio* ex rel. *Bryant* v. *Akron Park District*, 281 U. S. 74, 79.

The appellant is, therefore, in a position to urge this point now before this Court.

The holding of the court below in this case so as to follow *State* v. *Stevens*, 78 N.H. 268, ought to be reversed and the decision in that case set aside because the law of New Hampshire has been construed in such a manner as to deny a judicial trial, thereby converting the law into a bill of attainder contrary to the provisions of clause 1 Section 10 Article I of the United States Constitution.

Section 10 of Article I of the United States Constitution reads:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and Silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Cummings* v. *Missouri*, 4 Wall. 277.

Framers of the Constitution of the United States were well aware of the unjust consequences that would inevitably flow from the use of bills of attainder in this country. While at the time of the adoption of the Constitution some doubt was expressed as to the need for a specific prohibition on powers of Congress in this connection, to guard against the possibility of such a legislative usurpation of the judicial function, the attainder clause was enacted in its present form without opposition. See *Debates on the Adoption of the Federal Constitution*, Jonathan Elliott, Washington, 1845, Vol. 5, p. 462, and Vol. 3, pp.

66, 67; *The Federalist*, No. 44 (James Madison) and No. 84 (Alexander Hamilton).

Bills of attainder and bills of pains and penalties were first used in England as early as 1321. It was not until the civil war, which engendered passions, that bills of attainder were widely used. (*The Catholic Encyclopedia*, Vol. 11, p. 59). They were particularly and extensively used during the reign of the Tudor kings to accomplish acts that could not be done through the regular judicial process. *Encyclopedia Britannica*, 1940 ed., Vol. 2, p. 656.

"A bill of attainder was a legislative conviction for alleged crime, with judgment of death. Such convictions have not been uncommon under other governments and the power to pass these bills has been exercised by the Parliament of England at some periods in its history, under the most oppressive and unjustifiable circumstances, greatly aggravated by an arbitrary course of procedure, which had few of the incidents of a judicial investigation into alleged crime." Cooley, *Constitutional Limitations*, 8th ed., Vol. 1, pp. 536-539.

"The injustice and iniquity of such acts, in general constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods in which all nations are most lible (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others." Story, *Commentaries on the Constitution of the United States* (Bigelow, 1891), Vol. 2, p. 216.

Here the ordinance has been construed so as to require the appellant to comply with the unconstitutional denial of the use of the park by waiting until the civil courts have

eviewed, as a condition to obtaining judicial review. If e does not, upon his trial it is conclusively presumed that he administrative decision is valid and that he illegally efied it. In defense to the prosecution he cannot show hat he had a good defense. This is a denial of a judicial rial. He is penalized because he defied the administrative gency. If he submits to prior civil trial, a judicial trial nay be accorded him if he applies for it by petition for rit of mandamus.

The very fact that judicial review of the adminis- rative action is accorded by mandamus to a person who hallenges the administrative decision and the same is enied to a person who exercises his constitutional right s proof positive that the penality imposed against the efendant is a denial of a judicial trial. And when so ap- lied the ordinance is thereby transformed into a bill of ains and penalties. The general type of bill of attainder is ny law that deprives a person of judicial trial.

This Court had occasion to examine into the history f bills of pains and penalties when its opinion was written n *Cummings v. Missouri*, 4 Wall. 277, 320-332. In that ecision the provisions of the Missouri Constitution and nd statutes providing for a certain class of persons to take test oath were declared unconstitutional because com- rising a bill of pains and penalties, contrary to federal onstitution, Article I, Section 9, clause 3. In that decision he Court said:

"It was against the excited action of the States, under uch influence as these, that the framers of the Federal onstitution intended to guard. In *Fletcher* v. *Peck*, 6 ranch 137, Mr. Chief Justice Marshall, speaking of such ctions, uses this language: 'Whatever respect might have een felt for the States sovereignties, it is not to be dis- uised that the framers of the Constitution viewed with ome apprehension the violent acts which might grow ut of the feelings of the moment, and that the people

of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. . . ."

". . . The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be for ever banished from the realm; and that if he ever returned, or was found in England, or in any other of the King's dominions, after the first of February, 1667, he should suffer the pains and penalties of treason, with the proviso, however, that if he surrendered himself before the said first day of February for trial the penalties and disabilities declared should be void and of no effect. (6 *Howell's States Trials*, p. 391.)

"'A British Act of Parliament,' to cite the language of the Supreme Court of Kentucky, 'might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it. . . .' (*Haines* v. *Buford*, 1 Dana 510)"

The similar provision of the federal Constitution prohibiting bills of attainders by the federal government has been considered and invoked in *United States* v. *Lovett*, 328 U.S. 303. The mere fact that the vice here complained of is committed by the courts rather than the legislature does not change the matter any. A bill of attainder may result from a court decision which construes a legislative act. It is axiomatic that the constitutionality of a law depends on how it is interpreted by the courts as well as how it is written by the legislature. The bill of attainder provisions of the federal Constitution stops the hands of the courts as well as the legislature.

"The Constitution deals with substance, not shadows.

Its inhibition was levelled at the thing, not the name." (*Cummings* v. *Missouri*, supra.)

In the criminal proceedings brought against the appellant in the Superior Court he was denied his right to have his motion for judgment of acquittal granted. It asserted that the enforcement, construction and application of the ordinance was unconstitutional. The judgment of the trial court and of the court below struck out as immaterial all of the evidence showing the unconstitutionality and convicted appellant without regard to the evidence establishing admitted capriciousness in the unconstitutional denial of the application for the permit.

The sole question determined by the trial court was whether or not the appellant violated the order of the administrative agency. Whether or not the administrative determination was unconstitutional, the courts have held, may not be considered. What could be a worse denial of a judicial trial? The courts have held that the court will consider the evidence of the prosecution but not of the defense. This Supreme Court of New Hampshire has approved that type of highhanded judicial action which harks back to the ancient days of the Star Chamber and trials by ordeal which the founding fathers of the United States fled from and sought to insure the people against. Yet we find that in these modern days, under the sheep's clothing of convenience, the wolf (bill of attainder) has sneaked into the courtrooms of New Hampshire to devour blind justice.

The Kentucky Court of Appeals, in *Gaines* v. *Buford*, 1 Dana 481, held an act of the legislature to be a bill of attainder. The legislature ordered owners of certain lands to make certain improvements on or before a certain date. Pursuant to the act, failure to comply with the order automatically forfeited the title and vested it in the Commonwealth.

In *Kentucky* v. *Jones*, 10 Bush (70 Ky.) 725, the Kentucky Court of Appeals held another act of the legislature

violated the bill of attainder provision of the Constitution. The act provided for certain disqualifications of office holders within the Commonwealth. Administrative agencies, called [in the act] "boards of contest", were established. The findngs of these boards were made final by the statute with reference to the disqualification of an officeholder. If such boards found an officeholder to be disqualified, he was ordered to cease and desist from holding office. A refusal to cease an desist from holding the office constituted a crime under the statute. Jones was declared disqualified and ordered to vacate his office; and despite the order he held office and refused to vacate. He was indicted and convicted for failing and refusing to obey the order of the administrative agency. The court said:

" . . . it will be seen at once that the construction converts that section into a bill of pains and penalties, and thereby makes it repugnant to that clause of the federal constitution which provides that 'no state shall pass any bill of attainder'. . . . The statute created a 'contest' board, whose decision shall be final—binding and conclusive on the courts . . .

" . . . when the courts are called upon to enforce the judgments of the board, or to punish those who disobey its mandates, they have the power to inquire into and determine as to its jurisdiction in the particular case in hand. Without jurisdiction to act, the finding and judgment of any board or tribunal is necessarily void, and may be so treated by all the world. . . .

"To admit that contesting board may determine finally as to what constitutes legal disqualification for office would be to decide that the legislature, instead of confining these tribunals to the discharge of executive duites, and to the determination primarily of more questions of fact, had, in disregard of the powers of government, existing by virtue of the first article of the constitution, created a high judicial tribunal—a court with powers and authority to determine

finally and conclusively questions of individual rights arising under the constitution—and provided that it should be composed exclusively of high executive officers."

An act which undertakes to permit an administrative agency to inflict punishment, banishment or exile from the United States of a citizen, without judicial inquiry as to whether or not he was a citizen, was held to violate the bill-of-attainder clause of the Constitution, in the case styled In re *Yung Sing Hee* (Circuit Court, Oregon) 36 F. 437 (1888).

A statute of Iowa which provided for "vasectomy" of habitual criminals upon the finding of an administrative agency without judicial inquiry was declared to be a bill of attainder in *Davis* v. *Berry,* 216 F. 413.

The Supreme Court of New Hampshire has held that the usual right of a defendant in criminal proceedings ought to be denied in this criminal trial on the grounds of a technical violation of orderliness and a rule of convenience. This is said to promote criminal justice and to be a deserving instrument of orderliness.

Remarkable it is that scarcely any person undertakes to defend the method of trying defendants charged with failing to comply with an administrative order without insisting that this is a measure of judicial convenience, that one who fails to comply with the rule is to be regarded as the "domestic rebels" of medievel times with no rights under the law or Constitution, and that the crime is of such an odious nature that it has worked a forfeiture of even those rights which peculiarly belong to criminals. It is noticed that the Constitution guarantees one charged with treason, the highest crime, a right to a judicial trial. It is said that Poulos who refused to comply with the administrative policy and determination of Portsmouth is nothing more than criminal. It may, for the sake of argument only, be conceded that he is such. Is he not, as such, entitled to the benefit of all the laws made for criminals? If not so, who, may it

please the Court, are entitled to the benefit of the laws made for criminals? If the innocent have no use for them, and if the guilty have no claim on the rights conferred by these laws, then they are mere nullities.

The founding fathers were wise men and they labored in their day for the good of their race and posterity. They enjoyed peculiar advantages for the work which fell to their lot. They had been tried in the school of adversity. They had felt the rod of the tryant, and knew what oppression was. It was their mission to protect their people, who were few and weak, against the many and the strong, and establish fitting guards for liberty under all circumstances. The mission of the present generation is different. The people and the courts are to restrain the excessive indulgence of their own power. They are to hold back the revengeful career of a victorious party, and resist the tempting occasion of becoming tyrants themselves. They are to be generous to the fallen and just to liberty and to mankind. They have no bulwarks to erect for freedom. They need only preserve and defend such as they have.

It is respectfully submitted that the denial of the right to show the unconstitutionality of the policy of enforcement by the city of Portsmouth was a denial of a judicial trial. The denial of a judicial trial violates the constitutional prohibition of a bill of attainder. The judgments of the courts below are rendered in violation of that federal prohibition and ought, therefore, to be reversed.

IV.

The judgments of the courts below are not supported by adequate nonfederal grounds and therefore the federal questions presented must be considered and determined.

This Court is the tribunal to determine whether the nonfederal ground is substantial. *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773. The evasive decision by the court below

which did not consider the question raised is not conclusive on this Court.

The determination that appellant must first sue for a writ of mandamus instead of exercising his constitutional liberty is a burden and an abridgment of the rights guaranteed by the First Amendment that itself constitutes a federal question. "Where the non-Federal ground is so interwoven with the other as not to be an independent matter . . . our jurisdiction is plain." (*Enterprise Irrigation Dist.* v. *Farmers' Mutual Canal Co.*, 245 U. S. 157, 166.) The doctrine of *State* v. *Stevens*, 78 N. H. 268, was perhaps sufficient for general rights but, when applied, itself became a burden on freedom of speech and assembly under the holding of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, at page 306, and *Near* v. *Minnesota*, 283 U. S. 697.

When the history of the consideration of this question is considered it is apparent that the Supreme Court of New Hampshire is arbitrarily employing a device to prevent a review of the federal question. On certified questions it found enforcement of the ordinance to be valid under the federal Constitution because of the unwritten policy of the city council to zone the parks, permitting meetings of a religious nature in some and denying in others. When the question was brought back to it the second time it was evaded because of the failure to apply for a writ of mandamus. It is submitted therefore, that review by this Court cannot be evaded by the Supreme Court of New Hampshire by a nonfederal ground "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question". *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, 243 U. S. 147, at page 164. See also *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 22; *Postal Tel. Cable Co.* v. *Newport*, 247 U. S. 464, 475-476; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 282; *Rogers* v. *Alabama*, 192 U. S. 226, 230-231; *Davis* v. *Wechs-*

ler, 263 U. S. 22, 24; and *Brown* v. *Western Railway*, 338 U. S. 294, 299.

Where, as here, a determination by a state court is placed solely upon grounds of state or general law, but a federal claim was timely and properly asserted in the state courts, the failure of the state courts to pass upon the federal question thus asserted is not conclusive upon the Supreme Court of the United States. It will proceed to determine whether the nonfederal ground of decision independently and adequately supports the judgment. *Chicago B. & Q. Ry.* v. *Illinois* ex rel. *Drainage Comm'rs*, 200 U. S. 561, 580; *West Chicago St. R. Co.* v. *Illinois* ex rel. *City of Chicago*, 201 U. S. 506, 519-520; *Wood* v. *Chesborough*, 228 U. S. 672, 676-680.

It is submitted that the procedural basis for the affirmance was not an adequate or a sufficient state ground to support the judgment below.

Conclusion

It is submitted that the decision of the Supreme Court of New Hampshire should be reversed because it conflicts with the holdings of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, and *Royall* v. *Virginia*, 116 U. S. 572, and is otherwise erroneous for the reasons above discussed. The judgment of conviction ought to be set aside, and the court below directed to enter a judgment of acquittal because of the unconstitutionality of the policy of the city of Portsmouth in the enforcement of the ordinance regulating public meetings in the parks of Portsmouth.

If the Court does not now conclude that the judgment should be set aside and an acquittal entered, then the judgment of the Supreme Court of New Hampshire ought to be vacated and the cause remanded to it with directions to consider and determine the constitutionality of the construction and enforcement of the ordinance by the city

officials of Portsmouth according to the circumstances that existed on the date that appellant was arrested for exercising his constitutional rights in the park without a permit when he was illegally denied it by the City Council. See *Musser* v. *Utah*, 332 U. S. 95.

Respectfully submitted,

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December, 1952.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS, APPELLANT,

vs.

THE STATE OF NEW HAMPSHIRE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

REPLY BRIEF FOR APPELLANT

HAYDEN & COVINGTON

Counsel for Appellant

STATUTES CITED

MISCELLANEOUS CITATIONS

Supreme Court of the United States

OCTOBER TERM, 1952

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REPLY BRIEF FOR APPELLANT

MAY IT PLEASE THE COURT:

The argument of the appellee boils down to two propositions:

(1) New Hampshire has in the past been fair in dealing with the civil liberties of Jehovah's witnesses and, therefore, it must be presumed that the judgment of the court below is fair and constitutional in this case;

(2) the burden of certiorari, as a condition precedent to the exercise of civil liberties in this case, is so inconsequential that there is no violation of the First and Fourteenth Amendments.

I.

The State of New Hampshire is to be commended for the fine record that its Supreme Court has made in the field of civil liberties. Its maintenance of calm weather and a mild climate for Jehovah's witnesses when plagued throughout the nation for their refusal to salute the flag (while this Court had not yet done so) is noteworthy. It stood on the same level with the New York Court of Appeals and the Supreme Court of Illinois in refusing to go along with approval of abridgment of liberty through the license tax by this Court. Also the New Hampshire Supreme Court distinguished itself by not enforcing the child labor law to worship by minors of Jehovah's witnesses, when this Court approved the same. Compare In re *Lefebvre*, 91 N. H. 382, 20 A. 2d 185 (1941), with *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940). But the holding in *Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251 (1942), was more outstanding. Compare also *People* v. *Barber*, 289 N. Y. 378, 46 N. E. 2d 329 (1943); and *City of Blue Island* v. *Kozul*, 379 Ill. 511, 41 N. E. 2d 515 (1942) (on motion for rehearing by the City of Blue Island), where the courts refused to follow *Jones* v. *City of Opelika*, 316 U. S. 584 (1942), reversed at 319 U. S. 103. See and also compare *State* v. *Richardson*, 92 N. H. 178, 27 A. 2d 94 (1942), with *Prince* v. *Massachusetts*, 321 U. S. 158 (1944).

Notwithstanding the good reputation of the Supreme Court of New Hampshire and regardless of its fine record in the field of civil liberties, it must be judged according to the present and not the past. Even persons with good reputations and characters can go wrong. Also courts are not immunized from error by their past records. It is human to err. This Court will determine the correctness of the decision in this case by what has happened here and not according to what the Supreme Court of New Hampshire

has done in previous civil liberties cases involving Jehovah's witnesses.

It is obvious that the fine record of the court below has been marred by its abberation in this case. The purpose of the appeal in this case and the arguments made by the appellant in this Court, therefore, are to show the Court the error into which the court below has fallen and help this Court to pull the court below out of the ditch and back upon the straight and narrow path of rectitude it made for itself in this field of law in the past.

II.

Since the appellee has made no effort at all to answer one prong of the argument of the appellant (whether relegating the broadcaster of ideas in the parks of the state to the civil remedies of certiorari and mandamus as a condition precedent to the exercise of his civil liberties is an *expensive* and *costly burden* upon rights guaranteed by the Constitution, thereby abridging the rights) appellant will not argue further on that feature of the point. It is amply covered in the main brief.

However, the argument of the appellee that the remedy of certiorari in the state is so speedy that it cannot be a delayed time burden to speakers or the people desiring to exercise their constitutional rights must be replied to.

While it was intimated by the court below in its opinion that the writ of mandamus may be available as a remedy, it seems plain from the decisions that mandamus cannot be resorted to. (See *Storer Post* v. *Page*, 70 N. H. 280, 47 A. 264, and *Hart* v. *Folsom*, 70 N. H. 213, 47 A. 603.) However it is true that the remedy of certiorari may be resorted to. That remedy is fraught with dangerous procedural technicalities of the common law writ of certiorari. It is also a discretionary remedy. *Dinsmore* v. *Mayor and Aldermen*, 76 N. H. 187, 191, 81 A. 533. No issue of fact can be inquired into under the writ. (*Cloutier* v. *Milk Con-*

trol Board, 92 N. H. 199, 203, 28 A. 2d 554.) It was also held in the *Cloutier* case, *supra*, that the inquiry on certiorari is limited to jurisdictional and law questions only. Where there is a remedy by appeal the writ of certiorari will not be granted.—*Waisman* v. *Board of Mayor and Aldermen*, 96 N. H. 50, 69 A. 2d 871; *Willis* v. *Wilkins*, 92 N. H. 400, 32 A. 2d 321; *Barker* v. *Young*, 80 N. H. 447, 119 A. 330.

In *Grand Trunk Railway Co.* v. *Berlin*, 68 N. H. 168, 170, 36 A. 554, the Supreme Court of New Hampshire states that "The writ is not awarded as a matter of right, and is withheld where substantial justice has been done or the party has another remedy that is ample and convenient". (See also *Logue* v. *Clark*, 62 N. H. 184.) *Moffett* v. *Gale*, 92 N. H. 421; 32 A. 2d 526, and *Leighton* v. *Concord & Montreal Railroad*, 72 N. H. 224, 231, 55 A. 938, held that certiorari is entirely discretionary.—Compare *N. H. Racing & Breeding Association* v. *N. H. Racing Commission*, 94 N. H. 156, 48 A. 2d 472.

Since the judicial inquiry by certiorari is limited to the record made before the administrative agency and no new evidence *de novo* may be received, and, inasmuch as the City Council of Portsmouth is not a court of record, it is obvious that the ordinary layman, seeking to get a permit to hold a meeting in the park, would find himself in a very difficult position in a court on certiorari sans a record sufficient to properly present the question of constitutional law to this Court. To protect himself he would need a lawyer to represent him in applying for a permit. The remedy, for all practical purposes, is a remedy in name only.

The appellee equivocally attempts to lead this Court to believe that the appellant has the speedy and absolute right to go directly into the Supreme Court of New Hampshire in an original action for the writ of certiorari against the city council. This is a specious argument. When scrutinized more closely, bringing original proceedings in

the court below is seen to be an elusive and risky step to take. Section 2 of Chapter 360 of the Revised Laws of New Hampshire of 1942, defining the jurisdiction of the Supreme Court of New Hampshire, uses the word "may" in connection with the issuance of the writ. That section of the statute indicates the issuance of the writ in original proceedings is purely discretionary. Moreover, it appears from a reading of the statute that the court may limit the issuance of the writ to the exercise of appellate jurisdiction.

Certainly there is nothing in the statute that would preclude the court from following the usual practice of all other state appellate courts (especially courts of last resort) in requiring an applicant first to apply to some lower court for the writ. In the state of New Hampshire, while there is no Supreme Court decision commanding the procedure, it seems to be the practice for the seeker of the writ of certiorari to go first to the Superior Court. The usual appeal procedure then is followed by transferring the case through bill of exceptions to the Supreme Court of the State for review. That was the procedure followed in *Dinsmore v. Mayor and Aldermen*, 76 N. H. 187, 81 A. 533, and the majority of other certiorari cases.

The rule of making the applicant first apply to the Superior Court and then come to the Supreme Court of the State by way of exceptions seems to be uniform, especially in all proceedings for the writ against local administrative agencies. Very few, if any, original proceedings for the writ of certiorari in the Supreme Court of New Hampshire against a city can be found in the reports. All of the original writs that have been issued by the Supreme Court of New Hampshire against a city are in election cases. Original proceedings in the Supreme Court of New Hampshire in election cases are authorized by special statute. See for example *Daniel v. Gregg and Fuller*, 91 A. 2d 461 (1952), where the original proceeding was authorized by Section 27 of Chapter 42 of the Revised Laws of New Hampshire

of 1942. The statute does not help the political speech-maker against the denial of permits to talk in the parks during a campaign. It is limited to proceedings disqualifying a candidate.

Section 6 chapter 370 of the Revised Laws of New Hampshire confers jurisdiction on the Superior Court, the court of general jurisdiction in the state. That court must take cognizance of all cases that are not specifically provided to be brought in other courts. While the Supreme Court may (if it chooses) issue an original writ to a local administrative body, it seems that the New Hampshire practice is to let proceedings for certiorari against these boards be brought in the Supreior Court. This is the usual custom in practically all of the forty-eight states, as has been said. The states that permit these original writs in their highest courts are indeed very few. The New Hampshire practice, therefore, seems to be in conformity with the procedure in the majority of the states.

In *Nelson* v. *Morse*, 91 N. H. 177, 16 A. 2d 61, it is stated that "The authority to issue writs of certiorari is understood to be original in concurrence with that of the Superior Court, as well as appellants from that Court or in the tribunal exercising judicial functions, while the original authority of this Court will be exercised only sparingly and in exceptional cases where it is exercised by the Superior Court and causing undue hardship".

This Court ought not to permit itself to be misled by the specious argument that the writ of certiorari is a speedy and efficient remedy. Even though it may doubtfully be said to be speedy (through an original action in the Supreme Court of New Hampshire), still it is a burden and an abridgment to compel the citizen, armed with the First and Fourteenth Amendments, to resort to certiorari as a condition precedent to the exercise of civil liberties. It is, to say the least, a denial of due process of law to permit the State of New Hampshire to forfeit the right of the appel-

lant to challenge the validity of the law in these particular criminal proceedings. Why?

It should be remembered that the Supreme Court of New Hampshire permitted Jehovah's witnesses to challenge the constitutionality of the statute (identical to this ordinance) as construed and applied to the facts and enforced by the local authorities of the City of Manchester in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508, affirmed *Cox* v. *New Hampshire*, 312 U.S. 569. On a factual stipulation identical to the facts proved in this case the court considered the validity of the law as enforced and construed and applied in this case and held it to be valid. (*State* v. *Derrickson*, 97 N. H. 91, 81 A. 2d 312.) This action by the court and the consideration of the question in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508, led the appellant to believe that he had the right to challenge the validity of the ordinance in these proceedings and that the rule of *State* v. *Stevens*, 78 N. H. 268, 99 A. 723, did not apply. Resorting to the rule of *Stevens, supra,* as an afterthought by the court, when previously it had indicated that it did not apply in *Derrickson* (97 N. H. 91, 81 A. 2d 312), estops the court below from using *Stevens* as a trap for appellant and to avoid consideration of the same question in this case which it had considered in *Derrickson*. This Court, according to the Constitution, should administer equal justice under law and disregard the form, name and the technicalities of the Supreme Court of New Hampshire in this case and strike through to the substance of the case. Doing this requires that neither the motion to dismiss nor the motion to affirm should be granted.

After all is said and done by the appellee and the courts below, the Court ought to consider the labyrinth into which the argument advanced by New Hampshire would lead the Court. Even if the writ of certiorari, the only available writ in New Hampshire, is granted, where will the appellant be? Can appellant in that proceeding

challenge the constitutionality of the ordinance and raise the question in the state courts that is presented to this Court? Apparently the constitutionality of the ordinance cannot be challenged in New Hampshire courts even by way of certiorari. *Hart* v. *Folsom*, 70 N. H. 213, 217, 47 A. 603, 605, holds that one, applying for a permit or resorting to the administrative remedies of a regulatory statute such as this, may not challenge the constitutionality of the law thus submitted to. Unless this rule is limited or relaxed by the Supreme Court of New Hampshire, even if appellant should resort to the writ on another application for permit in the future, it would not help him. He would find himself blocked or trapped in the same shameful manner that he has been tried, convicted and punished here without the right to defend himself and urge his constitutional right.

The Court should not let itself be pushed onto the thin ice by the arguments of judicial convenience and procedural expedience urged by appellee. It should be remembered that appellant and his listeners in the park at Portsmouth together have the jointly shared right to hold a meeting and deliver and listen to a talk. This is guaranteed by the Constitution. The administrative regulatory procedure was pursued and exhausted. That was enough to appeal to this Court to protect the rights. Regardless of the fancy argument and fashionable relegating of appellant to the gauntlet of lawyers and judges, the question to be decided still remains: Does that suggested certiorari procedure, through burdens of time and expense, abridge the rights of the people guaranteed by the federal Constitution? Appellant says it does.

Considerations of municipal convenience by applying for a permit as a condition precedent to challenging the constitutionality of a law were rejected in *Lovell* v. *Griffin*, 303 U. S. 444, 452-453. The desirability of maintenance of order and the preservation of the rights of the municipality were found not to be sufficiently heavy to outweigh the

liberty of the press in *Schneider* v. *New Jersey*, 308 U.S. 147, 161-162, and *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96, 97. Orderliness of judicial procedure and the availability of the writ of mandamus in Connecticut did not forfeit the right to challenge the validity of the law as construed and applied in *Cantwell* v. *Connecticut*, 310 U. S. 296, 305-306.

The appellee attempts to distinguish the holding of the Court in *Estep* v. *United States*, 327 U.S. 114, through suggestion that the writ of mandamus, certiorari and habeas corpus were not available to Estep before induction. The writs were not held not to be available to Estep. They were held not to be available in many cases where there was no exhausting of the administrative remedies by reporting for induction and refusing to submit as Estep had done. The denial of these exceptional remedies was on the grounds that the registrant failed to report for induction and exhaust his remedies. In cases where there has been an exhaustion of remedies by reporting and refusing to submit to induction there is no question that the exceptional civil remedies would have been available if quickly sought. (See Ex parte *Fabiani*, 105 F. Supp. 139.) The statement quoted from *Davis on Administrative Law*, at page 756, by the appellee should be accepted with the above-stated qualification.

What more can be said except that appellee's contentions should be rejected by this Court?

Wherefore it is submitted that the motion to dismiss or affirm should be denied, that jurisdiction should be noted, the judgment of the court below should be reversed and appellant discharged or, in the alternative, the case should

be remanded to the Supreme Court of New Hampshire for further proceedings not inconsistent with the opinion to be written herein.

Respectfully,

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January, 1953.

and in complete accord with decisions of this Court. It correctly assessed the situation when it said:

> "'The issue which this case presents is whether the City of Portsmouth can prohibit religious and church meetings in Goodwin Park on Sundays under a license system which treats all religious groups in the same manner.'" *State* v. *Derrickson*, 97 N.H. 91, 95, 81 A. 2d 312, 315.

Indeed, the facts presented were insufficient and there was no need for a determination of "whether a city could prohibit religious meetings in all of its parks". The decision relied implicitly upon the unanimous affirmation which its previous opinion in *State* v. *Cox*, 91 N.H. 137, had been accorded by this Court in *Cox* v. *New Hampshire*, 312 U.S. 569, 85 L. Ed. 1049, 61 S. Ct. 762. It was further pointed out that the ordinance in question in the present litigation was identical to the one under consideration in the *Cox* case (*supra*).

It expressly recognized the previous construction that:

> "'The discretion thus vested in the authority [City Council] is limited in its exercise by the bounds of reason; in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate consideration and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate. The licensing authority has no delegation of power in excess of that which the Legislature granting the power has and the Legislature attempted to delegate no power it did not possess. *State* v. *Cox, supra*'". *State* v. *Derrickson*, 97 N.H. 91, 93, 81 A. 2d 312, 313.

Nothing throughout its entire decision transgressed, modified or broadened the construction previously accorded the language of the ordinance and statute.

Conclusion

It is submitted that the only question before the Court in the instant case was the guilt or innocence of the accused, that the decision of the Supreme Court of The State of New Hampshire rests solely upon local grounds and that no determination of any federal question was necessary or proper.

Respectfully,

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HENRY DOWST, JR.,
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ARTHUR E. BEAN, JR.,
Law Assistant.

August 29, 1952.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS,

Appellant,

v.

THE STATE OF NEW HAMPSHIRE,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S STATEMENT OPPOSING JURISDICTION

Pursuant to paragraph 3, of Rule 12, Rules of the Supreme Court of the United States, comes now The State of New Hampshire appellee, in the above-entitled case, by its Attorney General, disclosing the following matters or grounds making against the jurisdiction of the Supreme Court of the United States, as asserted by the appellant in a statement as to jurisdiction served upon the appellee on August 14, 1952.

Statement of the Case

The Appellant, a member of the Jehovah's Witnesses, was tried, found guilty, and fined twenty dollars in the Superior Court for Rockingham County, State of New Hampshire, for conducting an open-air meeting in a small park in the City of Portsmouth without a license, in violation of the following ordinance which the Supreme Court of the United States sustained as constitutional in *Cox v. New Hampshire*, 312 U.S. 569, 85 L. Ed. 1049.

> "Sec. 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the city council." *Municipal Ordinances of the City of Portsmouth*, chapter 24, article 7, section 22.

The right to a jury was waived [7]* and the appellant admitted the violation of the ordinance [20]. However, he interjected, over protests [29], proof that the City Council had arbitrarily and unreasonably refused to issue a license to speak on religious topics in Goodwin Park on two particular Sundays when the violations occurred and, hence, he argues that his constitutional rights of freedom of assembly, speech, and worship had been violated contrary to the Bill of Rights of the New Hampshire Constitution and the First and Fourteenth Amendments to the United States Constitution. In this regard, the Superior Court in reaching its verdict, reasoned as follows: [5]

> "Counsel have tried these cases on the theory that the refusal of the City Council to grant licenses to the respondents was in issue. It is found as a fact

---

* Numbers appearing herein in brackets refer to the printed Bill of Exceptions.

that the action of the City Council in refusing to grant licenses to the respondents was arbitrary and unreasonable, but the Court rules as a matter of law that *this issue is not properly before it in these proceedings*". [Emphasis added]

The members of the City Council were not parties to the litigation although they were called by the appellant to testify. [33] No charges were made nor any proof introduced by the prosecution which placed in issue the reasonableness of the action of the City Council. The trial court observed that the appellant "could have raised the question of [his] right to [a] license to speak in Goodwin Park by proper civil proceedings in this Court, but [he] chose to deliberately violate the ordinance". [5]

I. No Substantial Federal Question is Presented.

A. Introduction.

Appellant seeks a review of the judgment of the New Hampshire Supreme Court under the provisions of 28 U.S.C. Sec. 1257 (2), which provides that:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. . . . "

In this case, the New Hampshire Supreme Court has stated:

> "It has been conceded by the defense on this transfer, as well as on the first one, that the ordinance is valid on its face. It is identical in language with the

statute that was construed as valid in *State* v. *Cox*, 91 N.H. 137, which was affirmed in *Cox* v. *New Hampshire*, 312 U.S. 569." *State* v. *Poulos*, 97 N.H. ——, No. 4113, Dec'd. April 26, 1952, as modified on Rehg. June 3, 1952.

Even if this review is entertained by the United States Supreme Court as if it were a petition for a writ of certiorari in accordance with Section 237 (a) of the Judicial Code (28 U.S.C. Sec. 344) as cited by the appellant in his statement, because it was "improvidently taken" in the form of an appeal, the Supreme Court could only consider the federal questions, if any, which had been passed upon by the State Supreme Court. *Wilson* v. *Cook*, 327 U.S. 474, 90 L. Ed. 793, 66 S. Ct. 663 (1946).

B. The record discloses affirmatively that in the opinion from which this appeal is taken, the decision of a Federal question was Not necessary to the determination of the case; that such a question was Not decided and judgment was in fact rendered without such a decision.

The respondent admitted his violation of the ordinance, and then excepted to the denial of his motion for acquittal and finding of not guilty. It was on the basis of this exception that the case was appealed to the Supreme Court of New Hampshire, which opined "Exceptions Overruled".

In support of his motion for acquittal in the lower court, the appellant had argued that the City Council had acted arbitrarily and capriciously—which in New Hampshire is the usual basis for certiorari. *State* v. *Poulos*, 97 N.H. 91, 88 A. 2d 860, 862. (Dec'd. April 26, 1952). He had further argued that it was the duty of the Council to issue a permit under the circumstances of the case. This, in New Hampshire is sufficient grounds for a mandamus. *State* v. *Poulos, supra.*

Neither argument is a defense to the complaint that the appellant committed the acts charged and did so without a license. These facts were established beyond a reasonable doubt by undisputed testimony. On this issue, which was the only issue raised by the exception, the legal principle applied in New Hampshire courts is that the "wrongful refusal to license is not a bar to a prosecution for acting without a license." *State* v. *Poulos, supra.* Thus, it is clear in the opinion of the court, that this question was decided on the adequate basis of local law—not federal. *State* v. *Stevens,* 78 N.H. 268, 99 Atl. 723. The decisions of other jurisdictions are in accord. *Phoenix Carpet Co.* v. *State,* 118 Ala. 143, 22 So. 627; *State* v. *Orr,* 68 Conn. 101, 35 Atl. 770.

The Court pointed out that certiorari was the adequate remedy for the defendant, and its decision did not deprive the appellant of protecting and enforcing his constitutional rights by this method. *State* v. *Poulos, supra,* at p. 863.

The State will concede that in instances where the constitutionality of the licensing statute is in doubt, or even undecided, there would be additional and persuasive considerations which would lend support to the appellant's position. *Hague* v. *C. I. O.,* 307 U. S. 496, 83 L. Ed. 1423, 59 S. Ct. 594; *Lovell* v. *Griffin,* 303 U.S. 444, 82 L. Ed. 949, 58 S. Ct. 666. However, where the record discloses that the speaker knew of the existence of the law [20], and that in applying for a license not only knew of the decisions of the United States Supreme Court on the activities of the Jehovah Witnesses but applied them in their presentation requesting a license [30], and that they nevertheless "deliberately" chose to violate the law, such considerations are completely answered. [5]. Under these circumstances, the courts of New Hampshire might well have

refused to hear testimony bearing on the reasonableness of the Council's action.

The argument of counsel on basis of federal question before the Court is not conclusive, since such arguments are not a part of the record. Nor can the fact that all counsel, including the representing appellee, considered federal questions in their brief be conclusive or even persuasive evidence that such an issue was considered when the opinion of the Court itself does not affirmatively disclose it as a necessary decision in its determination of the issue before it. *Gibson* v. *Chonteau*, Mo. 1868, 8 Wall. 314, 317, 19 L. Ed. 317; *Mutual Life Ins. Co.* v. *McGrew*, Cal. 1903, 188 U.S. 291, 47 L. Ed. 480; *Zadig* v. *Baldwin*, Cal. 1897, 166 U.S. 485, 41 L. Ed. 1087; *Sayward* v. *Denny*, Wash. 1895, 158 U.S. 180, 39 L. Ed. 941.

The best evidence upon which to determine whether or not the court considered a federal question, or should have considered it, and whether or not the determination of such a question was necessary to its conclusion, is the opinion itself. *State of Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 82 L. Ed. 685, 58 S. Ct. 443, 113 A.L.R. 1482; Rehearing Denied 303 U.S. 667, 82 L. Ed. 1123, 58 S. Ct. 641 (1938). The examination of the court's opinion to make this determination has been the accepted practice for more than a century. *Grand Gulf RR & Banking Co.* v. *Marshall*, 12 How. 165, 13 L. Ed. 938 (1851). The opinion itself is the original and authentic statement of the grounds of the decision under review. *Burbank* v. *Ernst*, 232 U.S. 162, 58 L. Ed. 551, 34 S. Ct. 229 (1914).

No certificate of the State Supreme Court is submitted by the appellant. Under the circumstances of this case, the omission is significant. The true function of such a certificate is to aid in understanding the record, to clarify

it by defining the federal question, if any existed, and by indicating how it was raised and decided. *Honeyman* v. *Hanan*, 300 U.S. 14, 81 L. Ed. 476, 57 S. Ct. 350; Appeal Dismissed 302 U.S. 375, 82 L. Ed. 312, 58 S. Ct. 273 (1937).

However, since it so clearly appears from the opinion in this case that no federal question was raised, a certificate to the contrary would have been inconsistent with the opinion, and have little weight in determining the question. It certainly could not have conferred jurisdiction on this court if the opinion itself did not raise the federal question. *Louisville, etc. R. Co.* v. *Smith*, 204 U.S. 551, 51 L. Ed. 612, 27 S. Ct. 401.

The opinion of the Supreme Court of New Hampshire on the basis of the Agreed Statement of Facts proceeds on such widely recognized doctrines of constitutional law as to foreclose further argument. Technically, the appeal here presented for consideration is based upon the quoted opinion of the New Hampshire Supreme Court dated June 3, 1952. However, in compliance with the requirements of paragraph 1 of Rule 12 of the Supreme Court of the United States, the appellant has appended to his statement on appeal, an earlier opinion in a companion case, apparently to assist in the determination of the grounds of the final judgment. While it is obvious from a cursory reading of the earlier opinion in *State* v. *Derrickson*, 97 N.H. 91, 81 A. 2d. 312, that the Supreme Court of New Hampshire, relying on an agreed statement of facts presented by the reserved case, was acutely aware of the difficulty of passing upon such a problem under the circumstances,—it was recognized that the problems of fundamental rights may well depend for a correct solution, on a full examination of the individual factual situation. Nevertheless, the Court proceeded upon grounds which were indisputably sound

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 4113

WILLIAM POULOS,

Appellant,

v.

THE STATE OF NEW HAMPSHIRE,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION TO DISMISS OR AFFIRM

Now comes The State of New Hampshire, the appellee, herein, by Gordon M. Tiffany, its duly appointed, qualified and acting Attorney General, and moves the Supreme Court of the United States to dismiss with costs the appeal taken herein, to wit, by William Poulos, appellant, upon the following grounds:

(1) There is want of a substantial Federal question.

(2) It is manifest that the only Federal questions raised by the said appeal have been so explicitly decided by the Supreme Court of the United States in accordance with the

decisions of the Supreme Court of The State of New Hampshire, as to foreclose further argument on the subject.

(3) It is clear that the decision of the Supreme Court of The State of New Hampshire, affirming the convictions of guilty, denying the appellant's exceptions and upholding the constitutionality of the New Hampshire statute is correct.

In the alternative, appellee moves this Court to affirm the judgment from which the appeal in the above entitled cause purports to be taken on the three grounds heretofore mentioned in the appellee's motion to dismiss.

GORDON M. TIFFANY,
Attorney General of The State of New Hampshire.
HENRY DOWST, JR.,
Assistant Attorney General.
ARTHUR E. BEAN, JR.,
Law Assistant.

AUGUST 29, 1952.

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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS, APPELLANT

vs.

THE STATE OF NEW HAMPSHIRE, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S BRIEF

LOUIS C. WYMAN
Attorney General
HENRY DOWST, JR.
Assistant Attorney General

GORDON M. TIFFANY
Special Counsel

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS, APPELLANT

vs.

THE STATE OF NEW HAMPSHIRE, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S BRIEF

Opinions Below

The opinion of the New Hampshire Supreme Court is reported at 97 N. H. 352, 88 A. 2d 860. [61-66]* A previous opinion, entitled *State* v. *Derrickson*, answered questions of law before trial upon an agreed statement of facts and is reported at 97 N. H. 91, 81 A. 2d 312. [1-7]

Jurisdiction

Jurisdiction has been invoked under authority of the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter

* Figures in brackets refer to pages of the printed transcript of the Record.

440, 45 Stat. 466. This Court has postponed further consideration of the question of jurisdiction and the motion to dismiss or affirm pending a hearing on the merits, and transferred the case to the summary docket. [78]

The Ordinance

The ordinance drawn in question is copied from the statute which was construed as valid in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508 (1940) and affirmed by a unanimous court in *Cox* v. *New Hampshire*, 312 U. S. 569, 85 L. ed. 1049, 61 S. Ct. 762 (1941). It reappears in this case as sections 22, 23, 24 and 25, Article 7, Chapter 24 of the Municipal Ordinances of the City of Portsmouth, New Hampshire. It reads as follows:

> "Section 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the City Council.
>
> "Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open air public meeting.
>
> "Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such license[e] shall perform or exhibit or such parade, procession, or open air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.
>
> "Section 25. Penalty. Any person who violates section 22 of this Article shall be fined Twenty Dollars."

The Supreme Court of New Hampshire has not departed from the original construction of this language, namely, that:

> "The discretion thus vested in the authority [City Council] is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has and the legislature attempted to delegate no power it did not possess. *State* v. *Cox, supra,* 143" [3]; *State* v. *Derrickson,* 97 N. H. 91, 81 A. 2d 312 (1951).

Statement of the Case

The case originates with a complaint for conducting an open air public meeting in a small park in the City of Portsmouth without a license, in violation of section 22 of the above-quoted ordinance. From a conviction in the municipal court an appeal was taken to the Superior Court. In advance of trial and upon an agreed statement of facts the case was reserved and transferred to the Supreme Court of the State for rulings of law. An opinion (not drawn in question in these proceedings) which is reported at 97 N. H. 91, found nothing in the agreed statement of facts stipulated by counsel which would "raise an inference that Portsmouth is guilty of palpable invasion of the [appellant's] rights under any guise whatever." [6-7] Upon a trial, *de novo,* in which the right to a jury was waived, the testimony developed somewhat differently than the statement of facts which had previously been submitted by counsel to the

Supreme Court. [59] Although the appellant admitted the violation of the ordinance, his counsel moved for a finding of not guilty, dismissal and discharge. [57] The situation may be summarized by the language of the trial court:

> "Counsel have tried these cases on the theory that the refusal of the City Council to grant licenses to the respondents was in issue. It is found as a fact that the action of the City Council in refusing to grant licenses to the respondents was arbitrary and unreasonable, but the Court rules as a matter of law that this issue is not properly before it in these proceedings.
>
> "The respondents could have raised the question of their right to licenses to speak in Goodwin Park by proper civil proceedings in this Court, but they chose to deliberately violate the ordinance." [13]

The Court found the appellant guilty, imposed a fine of twenty dollars, and exceptions were taken to the verdict and rulings of law. Stay of execution of the sentence was granted as a matter of routine. [71, 74]

The Supreme Court, in overruling the exceptions, noted the defense conceded the ordinance was valid on its face and found no reason for overruling the law as stated in this jurisdiction that a wrongful refusal of a license is not equivalent to a license. By citing precedent, it demonstrated that this was the established mode of judicial procedure and that the defendant's proper remedy for any arbitrary and unreasonable conduct of the City Council was in *certiorari* or other civil proceedings. Implicit in the decision is a finding that such remedies not only were proper but were also available under the circumstances of the case. [63, 66]

Facts

In accordance with a widespread policy, Jehovah's Witnesses filed petitions in the early spring of 1950 to hold open

air meetings during the summer months. [35] The petition in Portsmouth was denied after notice and a hearing on May 4th at which the representative of Jehovah's Witnesses appeared and spoke in support of his petition to hold meetings on June 26th and July 2nd. [36-39] His arguments were somewhat confusing to the Council, which was obviously unable to grasp the significance of his learned discussion of the CIO and Schneider cases. [38] In a manner which the State agrees was entirely arbitrary and unreasonable, permission to hold the meetings was denied. Full and complete testimony was permitted by the trial court in this regard. Appellant, well understanding that a permit was required by a valid law, went ahead without the permit on the belief that he had a right to speak. The appellee agrees that the meetings were without violence and that the arrests were made peaceably. It is also conceded that the talks did not constitute an immediate incitement to riot or other disorder.

Summary of Argument

The only opinion drawn into question in these proceedings is the opinion of the Supreme Court of New Hampshire in *State* v. *Poulos*, 97 N. H. 352, 88 A. 2d 860, which held that once the violation of the ordinance had been proved, the issues were complete and that a collateral attack upon the denial of the permit by the City Council was not a bar to the prosecution. New Hampshire holds no brief for the decision of the Rhode Island court in *Fowler* v. *Rhode Island*, No. 340, since the ordinance in that case and the opinion of that court is entirely inapplicable to a discussion of this case.

The State of New Hampshire has ever been mindful of the constitutional guarantees to the freedoms of assembly, speech and religion. Nowhere is this more easily demon-

strated than in its decisions relating to Jehovah's Witnesses.

The present case itself is evidence that burdens of time and expense undertaken by the appellant to vindicate his rights are self-inflicted. The supervisory power of the Supreme Court of our State, not only over lower courts but also over administrative tribunals of state and city alike, as conferred by our Constitution and statutes, is not an empty power. It is frequently used to give speedy, adequate and equal protection to constitutional rights. These are fundamentals and are elementary knowledge to every practical minded attorney of the state. These remedies have been used successfully by communists, and horse racers—it is reasonable to assume in the light of the judicial hospitality which Jehovah's Witnesses have enjoyed in New Hampshire that equal courtesy would be extended to them. The allegations of appellant's brief that the alternative remedies would impose burdens of time and expense are without any evidence of proof whatever. On the contrary, the time and expense of this litigation would be avoided if counsel had really wanted to do so.

The orderly procedure suggested by our courts is well established in New Hampshire. It is not recently concocted for the sake of this case. There has been no "turgevisation," "ruse", or "avoidance" by our courts. It has simply suggested a proper remedy which was available, which would have permitted these meetings as scheduled and which would not leave our communities at the mercy of any individual or group which wished to defy their laws with impunity on the grounds of religious belief or advice of counsel.

However time-burdened the remedies suggested by our court may be in other jurisdictions, the facts in New Hampshire do not support, but vigorously contradict, any such contention in this state.

The non-federal grounds upon which the Supreme Court of New Hampshire based its opinion are adequate to support its judgment.

Argument

I

The decision of the New Hampshire Supreme Court merely restated an elementary principle of local procedure.

If, contrary to the appellee's contention, there is a federal question to be decided in this case, it is one which should not be lightly stirred. It is the issue of claiming immunity from obedience to a general civil regulation that, according to the highest court of the land, has a reasonable relation to a public purpose within the general competence of the state. To encase the solution of this problem within the rigid prohibitions of unconstitutionality presents awful possibilities. Wisdom dictates that such an issue should not be unnecessarily nor wantonly assailed.

Except the facts be commensurate with the issue, they should not be dignified by a decision of this Court. To borrow a phrase from the appellant's brief, it is expecting too much to ask for a sound determination where the issue has been "artificially-inseminated." (39)* Whatever the contention of counsel, the decision of the New Hampshire Supreme Court, from which this appeal is taken, was purely and simply the reiteration of a well established principle of local law. It is not to be termed "hedgehopping" nor "turgevisation" nor "evation." (37, 24) Viewed in its judicial setting, it is above reproach and its sincerity beyond question. As distinguished from the opinion of its sister court in Rhode Island (No. 340), the New Hampshire Court dealt with an ordinance patently different, which had been sustained by this Court. *Cox v. New Hampshire*, 312 U. S. 569, 85

* Figures in parentheses refer to pages of Appellant's Brief.

L. ed. 1049, 61 S. Ct. 762 (1941). It refused to rely upon the precedent so "essential" to the decision in that case, having specifically rejected it, in an earlier decision. *State* v. *Derrickson*, 97 N. H. 91, 81 A. 2d 312 (1951); 38 Va. L. Rev. 1075, 1076 (Dec. 1952).

II

The protection accorded Jehovah's Witnesses in New Hampshire fully establishes and guarantees their constitutional liberties. These rights have always been protected by the constitution, statutes and decisions of this jurisdiction in a manner recently approved by the Supreme Court of the United States.

Appellant has no grounds on which to complain about the courtesy and treatment which the state courts have scrupulously accorded to him and his brethren.

The freedoms of the First Amendment which have been recognized for over twenty-five years to be guaranteed against abridgment by the states under the due process clause of the Fourteenth Amendment, have always been accorded the highest degree of protection by the Constitution, laws and decisions of New Hampshire. Because of this, the theory recently advocated as to "deferred" and "preferred" rights has had no perceptible impact on our court decisions in New Hampshire. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639, 87 L. ed. 1628, 63 S. Ct. 1178 (1943); *Saia* v. *New York*, 334 U. S. 558, 562, 92 L. ed. 1574 68 S. Ct. 1148 (1948); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115, 87 L. ed. 1292, 63 S. Ct. 146 (1943); *Schneider* v. *Irvington*, 308 U. S. 147, 161, 84 L. ed. 155, 60 S. Ct. 146 (1939). But see, Frankfurter, dissenting, *West Virginia State Board of Education* v. *Barnette*, *supra* at pages 648, 649, and *"Second-class Constitutional Rights: Deferred Rights Versus Preferred Rights"* John Edward Thornton, 36 A.B.A.J. 640 (1950).

In 1942, the New Hampshire Supreme Court was faced with the problem of flag salutes. This was two years following the Gobitis decision, which had sustained the requirement of the flag salute, and two years before the Barnette decision, which overruled the Gobitis holding. The New Hampshire court found with certainty that it could not order the children of Jehovah's Witnesses to salute the flag. Not only was there no authority to make such an order, but the opinion stated that there would be "grave doubt" as to the constitutionality of such a statute. *State* v. *Lefebvre*, 91 N. H. 382, 387, 20 A. 2d 185, (1941). In that case, the children had been suspended from school under a school board regulation for no other reason than that they had refused to salute the flag because of their bona fide religious principles. Proceedings had been instituted to commit them to the State Industrial School as habitually delinquent children because of truancy. "But" said our court (p. 385) "in view of the sacredness in which the State has always held freedom of religious conscience, it is impossible for us to attribute to the legislature an intent to authorize the breaking up of family life for no other reason than because some of its members have conscientious religious scruples not shared by the majority of the community . . ."

Another instance in which the court of New Hampshire has protected the Jehovah's Witnesses in anticipation of a vindication of their rights by the Supreme Court of the United States is in the field of child labor laws. In *State* v. *Richardson*, 92 N. H. 178, 27 A. 2d 94 (1942), our court held that the prohibition forbidding an adult to permit children to sell newspapers on the public streets did not apply to children of the Jehovah's Witnesses' persuasion. Nevertheless, two years later, this court in *Prince* v. *Commonwealth of Massachusetts*, 321 U. S. 158, 88 L. ed. 645, 64 S. Ct. 438 (1944), sustained a similar prohibition as ap-

plied to this sect. In his dissent, Mr. Justice Murphy noted that the Court of New Hampshire had refused to apply the penalty to Jehovah's Witnesses, citing the *Richardson* case, *supra*.

It is perhaps worth pointing out that the freedoms of conscience, religion, toleration, press, speech and assembly have been protected since the New Hampshire Constitution was adopted eleven years before the adoption of the Constitution of the United States. *Constitution of New Hampshire*, Part I, Bill of Rights, Arts, 4th, 5th, 22nd, 30th, 32nd. Since its adoption, we have recognized the rights of religious minorities. Any person "who is conscientiously scrupulous" about bearing arms shall not be compelled to do so. *Ib.*, Art. 13th. Nor have we required Quakers to take the usual form of oath. *Ib.*, Part II, Art. 84. In 1641 we adopted The Body of Liberties, which "was the first elaborate scheme of statute law made operative by colonial legislation." Vol. I, *Laws of New Hampshire, Province Period*, 748, ftnote. Edited by Albert Stillman Bachellor (1904). Liberty 95, entitled "A Declaration of the Liberties the Lord Jesus hath given to the Churches" reads in part (par. 10):

> "We allow private meetings for edification in religion amongst Christians of all sortes of people. So it be without just offence for number, time, place and other circumstances."

Cf., *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 86 L. ed. 1031, 62 S. Ct. 766 (1942); *State* v. *Derrickson*, 97 N. H. 91, 81 A. 2d 312 (1951).

Thus, New Hampshire since its earliest days has recognized and lived by the freedoms which appellant contends are here abridged, and in recent years the Court has been ahead of its time in protecting these ancient rights particularly in the cases of Jehovah's Witnesses.

At the same time that the Body of Liberties was adopted (1641), the colonists recognized that:

> "Civil Authoritie hath power and libertie to deal with any Church member in a way of Civil Justice, notwithstanding any Church relation, office or interest". *Body of Liberties, supra,* 58

In the two instances where we have recognized the "power and libertie" of "Civil Authoritie" the decisions have been sustained by this Court. *State* v. *Cox,* 91 N. H. 137, 16 A. 2d 508, (1940) sustained, *Cox* v. *New Hampshire,* 312 U. S. 569, 85 L. ed. 1049, 61 S. Ct. 762 (1941); *State* v. *Chaplinsky,* 91 N. H. 310, 18 A. 2d 754, (1941) sustained, *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 86 L. ed. 1031, 62 S. Ct. 766 (1942). The courts today recognize that "even if activities . . . be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they will not cloak a person with immunity from the legal consequence for concomitant acts committed in violation of a valid criminal statute." *Ib.* p. 571. Nor is the right of free speech absolute. *Ib.* and cases *cited.*

In the present case, the court did not refuse to hear evidence (as it had in the Chaplinsky case) but having heard the evidence, it determined that the facts disclosed did not constitute a defense to the charge. This court has already stated that "Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine." *Chaplinsky* v. *New Hampshire, supra,* at p. 574.

III

The administration of justice consistent with well established rules of state procedure does not constitute a bill of attainder nor a violation of due process.

In the present case, the state courts have unanimously agreed that a collateral attack upon the denial of a permit to use the park did not constitute a defense to the charge of using it without permission. While this fundamental of state procedure is of more recent vintage than the liberties which have been discussed, it is equally well recognized and most certainly was not devised for the purposes of this case. The question had not been raised in the earlier proceeding by the agreed statement of facts before the trial. *Cf., State* v. *Derrickson,* 97 N. H. 91, 81 A. 2d 312 [1-7] As demonstrated by the citations of the court, this procedure was consistent with the previous practice established in this state. Under these circumstances the decision of New Hampshire does not contravene either section 10 of Article I of the Constitution of the United States nor the requirements of dues process under the Fourteenth Amendment. *Frank* v. *Mangum,* 237 U. S. 309, 326, 343, 59 L. ed. 969, 35 S. Ct. 582 (1914).

To the effect that decisions of administrative agencies are not open to collateral attack in New Hampshire, see: *State* v. *Stevens,* 78 N. H. 268, 99 Atl. 723 (1916); *Pittsfield* v. *Exeter,* 69 N. H. 336, 338, 41 Atl. 82 (1898).

IV

The extraordinary remedies which were available to the appellant in this case, as construed and applied by the New Hampshire Supreme Court in the exercise of its supervisory authority over lower courts and administrative agencies, afford speedy and ample relief to vindicate constitutional rights under a valid statute.

There can be no doubt as to the availability of "*certiorari* or other appropriate civil proceedings," as stated

by the Court. It is perhaps elementary; but such a statement by the highest court of the state includes such a finding. The lower court, having heard the testimony over the protests of the city solicitor, did not hesitate in making the finding of fact that the action of the city council was arbitrary and unreasonable. The fact that the trial court, which would also have had jurisdiction on a writ of *certiorari* in this same case, made such a finding, demonstrates beyond the shadow of a doubt, that immediate relief would have been granted if the issue had been before him in a proceeding which would have attacked the council's action directly.

The position of the appellant is somewhat anomalous in this aspect of the case. He has conceded throughout these proceedings that the statute is valid. *Cox* v. *New Hampshire, supra.* The Supreme Court of the United States having sustained that statute, sanctioned the registration requirement as construed by the court of last resort in New Hampshire. True, the administrative agency did not have "too wide" a discretion, but the requirement of registration was held constitutional and reasonable. Thus, the position of the appellant appears to be that he had a *right to a license* (rather than that he had a right to speak). The "hair trigger" remedy was, obviously, to assert that right by a direct attack upon the agency which had denied it. As the court suggested *certiorari* was the proper remedy. Nevertheless, with full knowledge of the validity of this requirement, he deliberately chose to violate its provisions. Even if he had believed in good faith that the law was unconstitutional, there would have been a substantial question as to the validity of such a defense. 22 C.J.S. *Criminal Law*, s. 48, p. 114, citing *Hunter* v. *State*, 158 Tenn. 63, 12 S.W. 2d 361, 61 ALR 1148. See *Note*, 61 ALR 1154 *et seq.* Nor as a general rule, would his religious convictions constitute a defense for his committing an act in violation of statute under these circumstances. 22 C.J.S. *Criminal Law*, s. 51,

p. 11); *Manchester* v. *Leiby* 117 Fed. (2d) 661 (1941); *State* v. *White*, 64 N. H. 48, 5 Atl. 828 (1886); *Reynolds* v. *United States*, 98 U.S. 145, 25 L. ed. 244 (1878). To sustain the contentions of the appellant in this case, therefore, would be to grant immunity to a particular religious sect from obedience to the general civil regulation. It is submitted that the time has not yet come when an individual, or a group may so assume the functions of the judiciary. In this case, there is no time burden as suggested by appellant's brief. (p. 30) Nor does the case of *Royall* v. *Virginia*, 116 U. S. 572, 29 L. ed. 735, 6 S. Ct. 510 (1886) give any support for his view. There, in fact, the court said that mandamus would lie in a case such as the present, because the city council acted wilfully and contrary to the statute as it had been construed by the highest courts. But the Royall case, as the court said, was "different." "The action of the officer [was] based on the authority of an act of the General Assembly of the State, which although it may be null and void, because unconstitutional, as against the applicant, gives the color of official character to the conduct of the officer in his refusal [to issue the license permitting the practice of law]." In the present case, the council, without 'too wide' discretion acted contrary to a constitutional statute as previously construed and sustained. Furthermore, the same day the Royall Case was decided, the court decided *Sands* v. *Edmunds*, 116 U. S. 585, 29 L. ed. 739, 6 S. Ct. 516 (1886) in which the state court had refused the *mandamus* when it had been requested. In the present case there is positive assurance that the extraordinary remedies suggested by the Court would be available. The City Council of Portsmouth could not possibly have made the defense in a mandamus action in this case, which the supervisors could have made in *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064, (1885) namely, "that the

law had conferred upon them authority to withhold their assent, without reason and without responsibility."

The case of *Estep* v. *United States*, 327 U. S. 114, 90 L. ed. 567, 66 S. Ct. 423 (1945) upon which the appellant relies for the proposition that the collateral attack upon an arbitrary decision of an administrative agency may constitute a good defense in a criminal prosecution is easily distinguishable. Davis, in commenting on the case points out:

> "Habeas corpus is the principal but not the exclusive method of reviewing decisions of draft boards under the Selective Training and Service Act of 1940. *Certiorari, . . . mandamus, . . .* injunction . . . , *and declaratory judgment, . . . have all been held the wrong remedy when sought before induction.* Even *habeas corpus* is denied before induction. . . . The only remedy other than *habeas corpus* is through defending a criminal prosecution for refusal to submit to induction." *Davis*, on *Administrative Law*, p. 756 (1951).

He points out that the last proposition was not "clearly established" until the *Estep* decision, *supra*.

In the present case, *however*, the extraordinary civil remedies which Davis says are not available under the Selective Training and Service Act, were available to Mr. Poulos. Furthermore, the subsequent history of the Estep decision and the distinctions made by the Court make it clear that its persuasive authority depends largely upon the facts of the particular case. *Sunal* v. *Large*, 332 U. S. 174, 91 L. ed. 1982, 67 S. Ct. 1588 (1946). See, discussion by Frederick Bernays Wiener, *Effective Appellate Advocacy*, pp. 59 *et seq.* (1950).

So far as assembly goes, the Jehovah's Witnesses have recognized the power of an injunction to restrain local

authorities from interfering with the right of assembly on the ground of fear of mob violence. *Sellers* v. *Johnson*, 163 F. 2d 877, 881-882 (8th Cir. 1947). So far as New Hampshire is concerned, we likewise reject any such apprehension of disturbance as a valid ground for refusing a license. *State* v. *Derrickson*, *supra*.

The position of the appellant might be well taken, if there were in fact an unreasonable time burden imposed upon him in seeking the relief of *certiorari* as suggested by the New Hampshire courts. Whatever may be the basis of his assumption that great time and expense would be involved, does not appear in his brief, and it would be fair to ask that such allegations be substantiated before such use is made of them.

In New Hampshire "it is the constitutional mandate that questions of law belong to the judiciary for final determination as a necessary deduction of the required separation of the legislative, executive and judicial powers of government. *N. H. Const.*, Part I, Art. 37." *Cloutier* v. *State Milk Control Board*, 92 N. H. 199, 28 A. 2d. 554 (1942). In that case, the Supreme Court reviewed the decision of an administrative agency by the proceeding of *certiorari original*. The part of the Constitution to which the Court refers, reads as follows:

> "[Art] 37th. In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with the chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity."

In an earlier article, the Bill of Rights in the state *Constitution* provides:

> "[Art.] 14th. Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

That this is no empty statement of principle, but a substantial fact is clearly demonstrated by the statutes and decisions which implement these constitutional pronouncements. If extraordinary remedies may be invoked by communists, and horse racers, they would most certainly be speedily available to those who wish to practice their religion. See, *Nelson* v. *Morse*, 91 N. H. 177, 16 A. 2d 61 (1940); (communist invoked *certiorari* and *mandamus* in the same proceeding and obtained a decision from Supreme Court the day after the petitions were filed); *Northampton Racing and Breeding Assn.* v. *Conway, et al.* 94 N. H. 156, 48 A. 2d 472 (1946) (race track promoters came directly into the Supreme Court on *certiorari original* to review the refusal of the state racing commission to grant a license). In instances such as the present, where a *certiorari original* might be desired in order to get a final decision during the two month period between the time the appellant applied for a permit and the time he wanted to speak, (May 4-July 2), questions of fact could be heard and determined by one or more of the justices, or by a master or referee as the court might order. *Revised Laws of New Hampshire*, (1942) *chapter* 369, *section* 6. Such a procedure would be particularly appropriate in a case where, as here, the appellant voluntarily waived his right to a jury trial. [15]

That the Supreme Court would have such jurisdiction cannot be questioned.

> "The supreme court shall have general superintendence of all courts of inferior jurisdiction to

prevent and correct errors and abuses, shall have exclusive authority to issue writs of error, and may issue writs of *certiorari*, prohibition, *habeas corpus*, and all other writs and processes to other courts, to corporations and to individuals, and shall do and perform all the duties reasonably requisite and necessary to be done by a court of final jurisdiction of questions of law and general superintendence of inferior courts." *Revised Laws of New Hampshire, chapter 369, section 2.*

Any argument that the Supreme Court of New Hampshire would lack original jurisdiction upon a writ of certiorari, to correct the error of the city council in this case would be summarily disposed. We long ago rejected the narrow definition of *certiorari*. We may go outside the record. As far back as the turn of the century, parties in a case such as this were "entitled under the established practice" to *certiorari* as "the most convenient procedure for the settlement of their controversy." *Densmore* v. *Mayor and Aldermen*, 76 N. H. 187, 190, 81 Atl. 533, (1911).

The appellant argues that in election matters this procedure would impose a time-consuming burden on the exercise of constitutional liberties. (30)* In October, 1952, the Supreme Court decided *Daniell* v. *Gregg* and *Fuller*, 97 N. H. 452, 91 A. 2d 461, (1952). Petitioner filed his complaint in the Supreme Court on October first, at two in the afternoon. Orders to appear and answer were accepted by the petitionees within three hours. Appearances and answers had been filed by five o'clock on the following day. Hearings commenced on October third at one o'clock. Depositions were taken at three o'clock and continued on October 4th. The Court rested on Sunday. The trial commenced in the highest court of the state on October 6th. Arguments had been completed and decision handed down on October 8th.

* Figures in parentheses refer to pages of Appellant's Brief.

See, also *Nelson* v. *Morse*, *supra*. Of course, an ex parte temporary injunction could have been obtained in the superior court in less time than it takes to describe it.

All of this procedure should be considered in the light of the facts of this particular case, since it is by a "delicate" balancing of the facts that the Court determines whether the sacred liberties are abridged. The facts in this case show there was a lapse of approximately two months between the time that the Portsmouth City Council denied the permit to speak and the time when the appellant wished to speak.

It is submitted that the solution of this problem is purely local; that the mutual tact and tolerance commended by our state Court in *State* v. *Richardson*, *supra*, that the mutual cooperation recently advocated by this Court in the released time decisions, all lead to this conclusion. See *"Church—State and the Zorach Case,"* 27 Notre Dame Lawyer, 529, 540 (1952). So long as the State of New Hampshire continues as it has in the past, to demonstrate its hospitality to the members of Jehovah's Witnesses, it has every right to expect that its established state procedure will, in turn, be respected. It is only through such mutual respect that the constitutional mandate of New Hampshire, vesting the judicial power in our courts, can be observed. Any other conclusion divests them of the authority to determine when a lower tribunal has acted arbitrarily, and would result in that power vesting in any individual or group which chose to violate the law. Had the question been seasonably raised in accordance with this well recognized state procedure, the time and expense of this litigation would have been avoided.

> "Non-compliance with such local law can thus be an adequate state ground for the decision below." *Edelman* v. *California*, No. 85, decided January 12, 1953.

The first amendment does not require government to show a callous indifference to religious groups. *Zorach* v. *Clauson* 343 U. S. 306, 314, 96 L. ed. 954, 72 S. Ct. 679 (1952). By the same token, the first amendment does not license a religious group to show a callous indifference to civil authority.

Conclusion

It is submitted that the Motion to Dismiss or Affirm the opinion of the Court below should be granted.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By: Louis C. Wyman
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Special Counsel

January 29, 1953.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS, APPELLANT,

vs.

THE STATE OF NEW HAMPSHIRE

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

Petition for Rehearing

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MAY IT PLEASE THE COURT:

Now comes Hayden C. Covington, counsel for appellant, and petitions the Court for a rehearing pursuant to Rule 33. Mr. Justice Reed extended the time to and including May 21, 1953, to file this petition. It is filed in time. The reasons of counsel for appellant shall now be stated. He says:

I.

This is no formal protest to the Court. Mistakes and

oversights appear in the opinion. The omissions and mistakes ought to be called to the attention of the Court because, through them, grievous wrong has been done to equal justice under law. That's why this petition is filed. I believe the Court will thank me for calling them to its attention. Now, please bear with me. Let me try to prove that seeds not intended to be sown by the Court have taken root and soon the Court will reap tares instead of wheat! It is not necessary for me to show the Court why the dissents of Mr. Justice Black and Mr. Justice Douglas are correct and should be unanimously used by the Court to uproot the strange and foreign sapling planted by the majority here. Those eloquent opinions stand by their own strength. They cannot be steam-rollered out of the way of the majority.

II.

(1) About part First of the opinion of the Court, Mr. Justice Frankfurter is right. See his concurring opinion. I didn't contend that the ordinance was construed and applied by the state courts. My argument was: the *city council* unconstitutionally enforced, construed and applied the ordinance; not the courts! I admitted that the ordinance is valid on its face. My contention that the ordinance was invalid as construed and applied was never decided by the state courts. The state courts and this Court were requested to declare the unconstitutionality of the enforcement of the ordinance by the city council. The state courts refused to say whether the city council defied the First and Fourteenth Amendments as contended. Neither did this Court say so. It stayed away from the point as far as possible, as though it were dynamite. It passed on whether the ordinance was void on its face (not raised) and as construed and applied by the state courts, when they didn't even determine that question.

(2) Perhaps this Court was misled by the holding of

the Supreme Court of New Hampshire on the certified questions. (*State* v. *Derrickson*, 97 N. H. 91, 81 A. 2d 312) The only time that the courts passed on the validity of the ordinance was when the Supreme Court of New Hampshire erroneously held that the city had properly zoned and allocated parks for religious meetings. This was a finding not justified by the stipulated facts. It was disproved at the second trial, in the Superior Court. See the record in this case. [4, 5, 6, 39, 44, 46-47, 49, 50, 52, 56][1] Whether the First and Fourteenth Amendments were violated by the executive state action of the city council was never determined (after the answer to the certified questions) by the state courts on the conviction or the appeal therefrom.

(3) The question presented by the appeal from the conviction to the Supreme Court of New Hampshire and to this Court was: Did the enforcement of the ordinance by the City Council of Portsmouth and the construction of it by the state courts denying the appellant the right to challenge its constitutionality because he failed to resort to the judicial remedy of certiorari, both or together violate the rights of the appellant contrary to the First and Fourteenth Amendments? In other words: Did the joint action, or the separate action, of the city council and the courts contravene the First and Fourteenth Amendments?

(4) The court below passed on only one phase of the question. It held that the federal question of invalidity of the enforcement of the ordinance by the city council couldn't be raised in defense to the prosecution. It said that the defense could be preserved only by way of certiorari. This was the only part of the question ruled on by the courts below.

(5) Neither the state courts nor this Court passed on the phase of the question that tested the constitutionality of the ordinance as enforced by the city council. Yet the

[1] Figures appearing in brackets herein refer to pages of the printed transcript of record.

ordinance is admitted to have been wrongfully and arbitrarily construed and applied. Did that admission by this Court amount to a holding that the construction of the ordinance by the city council violated the federal Constitution? I suggest that the Court's holding is ambiguous. It does; then it does not! Which is it? It is an evasion of the federal question on slender grounds. This evasion may be all right for the state courts. Arbitrariness, capriciousness and wrongfulness may be state questions. But it is highly out of place for this Court to side-step the unconstitutionality of the enforcement of the ordinance by the city council through merely holding that the denial of the permit was *wrongful*. It should not decide a question not presented in the record, as demonstrated by the opinion of Mr. Justice Frankfurter. The Court did this, however, in point First of its opinion.

(6) The error of this Court in discussing the wrong question and in failing to discuss the one raised ought now to be corrected. To that end and so that equal justice under law may be preserved, a rehearing and reargument of this appeal ought to be ordered. It cannot be said that the rehearing should not be granted because the unconstitutional action of the city council is not before the Court. It is.—See *Enterprise Irrigation Dist.* v. *Farmers' Mutual Canal Co.*, 245 U. S. 157, 164, 166; *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 22; *Postal Tel. Cable Co.* v. *Newport*, 247 U. S. 464, 475-476; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 282; *Rogers* v. *Alabama*, 192 U. S. 226, 230-231; *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Brown* v. *Western Railway*, 338 U. S. 294, 299; *Chicago B. & Q. Ry.* v. *Drainage Comm'rs*, 200 U. S. 561, 580; *West Chicago St. R. Co.* v. *City of Chicago*, 201 U. S. 506, 519-520 and *Wood* v. *Chesborough*, 228 U. S. 672, 676-680.

(7) If this petition isn't allowed, then the unnatural deformity (not supported by the record) will stand for all time. All of us, including the courts below, know that that

deformity should never have been artificially impregnated into this case. It has swollen now to envelop and hide the real question raised: unconstitutionality of the action by the city council. It should be uprooted and pulled out of the record. This can be done only by a reargument and a resubmission of this case. For this reason alone the petition should be granted by the Court.

(8) I agree, therefore, with Mr. Justice Frankfurter on the error of the Court in its discussion of the question in part First of the opinion and I adopt his statements here. On the other hand, I disagree with his statement that the case should be treated as though it were here on certiorari. There is involved here the constitutionality of the ordinance, as applied by the courts in denying a federal defense and as enforced by the city council in unconstitutionally denying the application for a permit to use the park. This joint state action under the ordinance on the part of the city council and the courts together gives jurisdiction to this Court by appeal.—*Jamison* v. *Texas*, 318 U. S. 413.

III.

(1) Under part Second of the opinion of the Court, several times the Court limits appellant's contention. I didn't limit it to that considered by the Court: wrongful, arbitrary and capricious refusal by the city council to grant the permit. The statement of the Court about my contention is all right as far as it goes. But the Court doesn't go far enough. Only part of the truth is told. The whole contention made by me included the fact that appellant said the ordinance, as construed and applied by the city council, was a violation of his rights under the First and Fourteenth Amendments.

(2) There is a vast difference between (a) *wrongful* refusal, and (b) *unconstitutional* refusal of a permit. A refusal to grant a license may be wrongful and yet not unconstitutional. Why didn't the Court state this federal

contention in its opinion? A footnote of the opinion shows the actual contention made, which includes the federal question actually raised. The discussion by the Court of the question raised would, however, lead the reader to believe that the contention actually made was only that the refusal of the permit was arbitrary, capricious and wrongful. The truth of the matter is: The contention made all along the way very strongly is that the denial of the permit was a construction and application of the ordinance by the city council that flouted the First and Fourteenth Amendments to the United States Constitution. This was one phase of the federal question completely overlooked by the Court! Why?

(3) Had the opinion stated correctly the federal invalidity of refusal of the permit, the Court would have shown the full and complete and real federal question to be decided. That question was: Do (a) the unconstitutional refusal of the permit by the city council, and (b) also the denial of the defense to the prosecution, both or separately, constitute state action in violation of the First and Fourteenth Amendments? This dual question was properly presented in the courts below. It, with its two heads, is properly before the Court. The basis of the federal question has been missed by the Court through its saying that my contention was that the refusal of the license was wrongful. Instead the Court should say that the denial of the permit was claimed to be an unconstitutional enforcement and an executive construction of the ordinance by the city council in violation of the First and Fourteenth Amendments.

(4) The Court concedes that, if a permit had been denied under a void-on-its-face provision of an ordinance, the defense of a violation of the federal Constitution could be raised in this prosecution. This Court has said many times that a statute or an ordinance may be perfectly valid as passed by the legislature, but it becomes unconstitutional when enforced by the executive or administrative branch of the government. This law has been declared in so many

cases that it is trite to repeat it here. Yet it is necessary to say it again here because this Court has discriminated. It has invented a new distinction sustaining the invocation of the federal Constitution against legislative action but denying the right to raise it against administrative action.

(5) Does the Court now hold that, if a valid law is illegally administered so as to deprive a citizen of a federal right, the state courts can bar the citizen from asserting that the federal Constitution has been violated by the executive enforcement of the law? Well, the Court has held just that! Now, how can the Court, without blinking an eye, pitch out tons of printed pages of its opinions where the Court has said that it and the other federal courts may not be prevented from passing on a violation of the Constitution purely because it is done by the administrative branch of the state governments and not by the legislative branch? Has not this Court ruled inconsistently with its former holdings on this point? Yes! The Court did! See paragraphs (5) and (6) of V, at pages 11-12, below.

(6) Now, what's wrong? It seems plain to me that the Court has lost itself in a fog of abstractions and wandered into a labyrinth of argument about supremacy of municipal and judicial convenience over the First Amendment. The Court has for the first time held that judicial and municipal convenience constitute grounds for throwing away the First Amendment. To the contrary of the ruling here, this Court has many times held that rules of convenience do not weigh enough to overbalance the very heavy First Amendment. —*Schneider* v. *New Jersey*, 308 U. S. 147, at pages 161-162; *Thornhill* v. *Alabama*, 310 U. S. 88, at pages 95-98; *Cantwell* v. *Connecticut*, 310 U. S. 296, at pages 305-306; *Lovell* v. *Griffin*, 303 U. S. 444, at pages 452-453; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, at pages 638-639.

(7) Now the Court dashes along and, in one cavalier spurt, speeds through the red light of these decisions. Hasn't

the Court reversed itself? The decision here comes from blindness to its own holdings! Isn't it deafness to the commands of the 'founding fathers' who spoke to us in the First Amendment? This action conflicts with the Court's holdings last above cited. Alone, it's sufficient grounds for rehearing.

(8) The brief and pungent opinions of Mr. Justice Black and Mr. Justice Douglas clearly demonstrate the irreparable injury to the Constitution and the people by the decision in this case. To add any comment about them is gilding the lily. I won't do that! Let me adopt their opinions and make them a part of this petition for rehearing. Please consider them as a part of this petition. The statement that "delay is unfortunate" has not frozen the ice thick enough to support skating over any of the points made by Mr. Justice Black and Mr. Justice Douglas in their dissents (or by me in the main brief and reply brief). I ask the Court to reconsider the main brief and the reply brief in this case if more argument is required. Please do this, if there is an inclination to overrule this petition.

(9) Up until April 28, 1953, the people of the United States have been told by this Court that if they have a federally secured right and have complied with the administrative procedure validly required by the state, then they can exercise that federal right. Then comes the opinion for the Court! Where's the right now? Bogged down in the muddy ditch of convenience to courts. How can it be enjoyed, be free and be exercised if it's hamstrung by the "unfortunate delay" of prior judicial review? Isn't prior judicial review equally as vicious and unconstitional as prior restraint by the legislature? It's a burden and an abridgment upon the rights guaranteed by the First Amendment. We have prior restraint here under a valid law! Don't we? It's by the city council, and we're face to face with it! But the Court jumped the high fence of the arena to escape it and ran away from the unconstitutional enforcement of the law by the city council. Now it hides behind the

new, alien and diaphanous doctrine of prior judicial review and "unfortunate delay" grafted on to the First Amendment. What next!

IV.

(1). The "unfortunate delay" theory of the Court reminds me of the alligator allegory by Sir Winston. It is directly in point. He said: "Each one hopes that if he feeds the crocodile enough it will eat him last." The Court has fed religious park meetings and public religious talks in parks to the 'alligator' of expediency, order and convenience. All the talking in the world about order, convenience, necessity and "unfortunate delay"—words, words and more words —can't hide that fact either!

(2) May I state a hypothetical case to prove the application here of the statement by Sir Winston? It alone will be enough to show the need of a rehearing. Suppose there were a valid law regulating the church meeting places in Portsmouth. It isn't necessary to assume that Jehovah's witnesses have a church there; they do. See the record. [35] Assume then that the city council under the valid regulatory law unconstitutionally denied Jehovah's witnesses the right to open the door of their church and hold their religious meetings or permit their ministers to preach in such church? Then what?

(3). The very logic and force of the opinion of the Court, when applied in the light of this new situation, is that the city council could keep the church of Jehovah's witnesses closed for years. They would be prevented from assembling for worship upon their own private property until the long, drawn-out court proceedings were finished in this Court. "Unfortunate delay," you say! *Foul play,* I say! It makes Stalin chuckle in his grave. It causes the 'founding fathers', however, to thunder up from their graves a protest against the innovation and abberation of the Court in this case.

(4) The next step would be to treat some other mor popular religious group in the same way. And so on and o as the radical element grows in power in the administratio of government—state, local or national. Then you have th 'alligator' of expediency snapping at your own orthodox an accepted religions. Soon they would be decimated by th creeping monster of "unfortunate delay", order and loca fashion of convenience. That will be the end of religion an the First Amendment! Through the decision in this case th Court will have hog-tied itself! It will be too late to save the popular religions from being 'bait for the crocodiles'. You say it can't happen here? It has happened here! Read and reconsider the opinion of the Court. Then hitch it on to the above logical train of developments. There you have it, gentlemen!

V.

(1) The Court distinguishes *Royall* v. *Virginia*, 116 U. S. 572. It relies on the dictum in that opinion, which begins with the words, "as a general rule," and which continues by saying that mandamus is sufficient to protect against the "wrongful" denial of the permit by an officer who violates the commands of the statute requiring the issuance of a permit. Reliance upon this dictum and the distinction by the Court of *Cantwell* v. *Connecticut*, 310 U. S. 296, at page 306, ignores completely certain important fundamental holdings by this Court in other cases.

(2) The "general rule" of the *Royall* dictum does not extend to cases, like this one, involving civil liberties protected by the First Amendment. The general provisions of the Fourteenth Amendment without the aid of the specific provisions of the First Amendment were alone considered in the *Royall* dictum. A different result occurs when fundamental personal rights covered by the First Amendment are involved. The general rule of convenience of the *Royall* dictum meets up with and must yield the right of way to the

right to defend in civil liberties cases on the ground of unconstitutionality of the law as enforced. Did the Court intend to overrule the holdings of the Court made in *Schneider* v. *New Jersey*, 308 U. S. 147 at pages 161-162; *Thornhill* v. *Alabama*, 310 U. S. 88, at pages 95-96 and *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, at pages 638-639? To me it is plain that the Court rejected these holdings without any justification or without stating any reasons. It ought to say why these cases are being overruled or placed aside!

(3) There is patent inconsistency between the holding in this case and the holdings just cited. Read all of them and consider them together with the holding here. Then you'll see that what I say is true! The heavy blow to freedom of assembly and freedom of worship in this case rebounds. The dynamic First Amendment throws off completely reliance by the Court upon the "general rule" dictum of the *Royall* opinion. The strong provisions of the First Amendment spew out of the belly of the Constitution the poisonous doctrine of convenience and "unfortunate delay" pumped into it by the holding in this case.

(4) It seems obvious that the Court has overlooked completely the constitutional doctrines of (a) preferred position of the liberties guaranteed in the First Amendment, and (b) the weighing of the light municipal and judicial conveniences against the heavy freedoms of the First Amendment found in the cases just cited. If these holdings were in the mind of the Court and have been overruled by the Court, then it ought to order a reargument so that the people can see their fundamental liberties, which were protected in these cases, now openly and expressly disintegrated by the Court. Moreover, the case should be reheard so the Bar can know—and will not have to guess—whether the former decisions above cited are no longer the law.

(5) The Court says that judicial and municipal convenience prevents it from seeing the flagrant abridgment

of the rights of freedom of assembly and religion by the city council. The sandbagging of these freedoms by "unfortunate delay" and prior certiorari proceedings is a new holding. The Court says it can no longer consider the unconstitutionality of a law as enforced by the executive or as construed by the judiciary. The holding of the Court conflicts directly with former holdings of the Court in *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535, at page 545; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 20; *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 506-508; *Louisville & Nashville R. Co.* v. *Greene*, 244 U. S. 522, 527, 528, 530, 531; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434; *Sterling* v. *Constantin*, 287 U. S. 378, 393.

(6) Rehearing should be granted so that the people and the Bar can be told whether these cases above cited are the law. The people and the lawyers ought to know where they stand. When the Court says that unconstitutionality as applied is now different from invalidity on the face of legislation, do we have equal justice under the law? The Court should say expressly which is now the law: (a) the holdings in the cases just cited (that this Court can determine the unconstitutionality of enforcement of a law), or (b) the new ruling of this Court in this case that it cannot. The cases are in irreconcilable conflict. This conflict ought to be cleared up. It can be done only by a reargument of this case.

VI.

This Court's position in civil liberties cases to which it struggled high up the steep slope of adversity for years, was completely lost when it slipped in this case. It has now slid down right to the edge of the precipice. It is about to fall into a bottomless icy crevice through its decision here! But all is not lost. There is yet time for the Court to rescue itself. Within the grasp of the Court (now on the edge) is escape: this petition for rehearing! Grab a hold on the rescue-rope

now by giving heed to the words of Mr. Justice Sutherland, dissenting, in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103. He said:

> "Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." —301 U. S., at page 141.

Conclusion

WHEREFORE, while the Court may disagree with everything else said by me, it will agree with me on one thing. That is, that the beautiful shape of the First Amendment must be preserved. From the foregoing argument it seems to me plain that its beauty and symmetry have been marred and deformed by the unfortunate accident that the Court let it suffer in this case. To the end that the injury be corrected and that the symmetry of the law be restored, this petition should be granted. Please order the judgment vacated and a rehearing at a time convenient by granting this petition. After the end of this term (quickly drawing near) there may never be an opportunity for liberty to rise from the grave where it was plunged by this decision, if this petition is not granted.

On rehearing the Court should pass upon the federal constitutionality of the action of the city council properly

raised here. It then should decide, too, whether the decision in the case puts an end to the doctrines of (a) unconstitutionality as construed and applied, and (b) insufficiency of convenience as a balance-weight on the scales of justice against the rights protected by the First Amendment. All these issues were presented to the Court but overlooked by it, as shown above.

Respectfully,

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Appellant

May, 1953.

Certificate

I, the undersigned counsel for appellant, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith. It is made so that justice may be done, and not for the purpose of delay. I also certify that there are grounds for it under Rule 33 of the Rules of this Court.

HAYDEN C. COVINGTON
Counsel for Appellant